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HANDBOOK

OF

ADMIRALTY LAW

BY

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OF THE NORFOLK (VA.) BAR

SECOND EDITION

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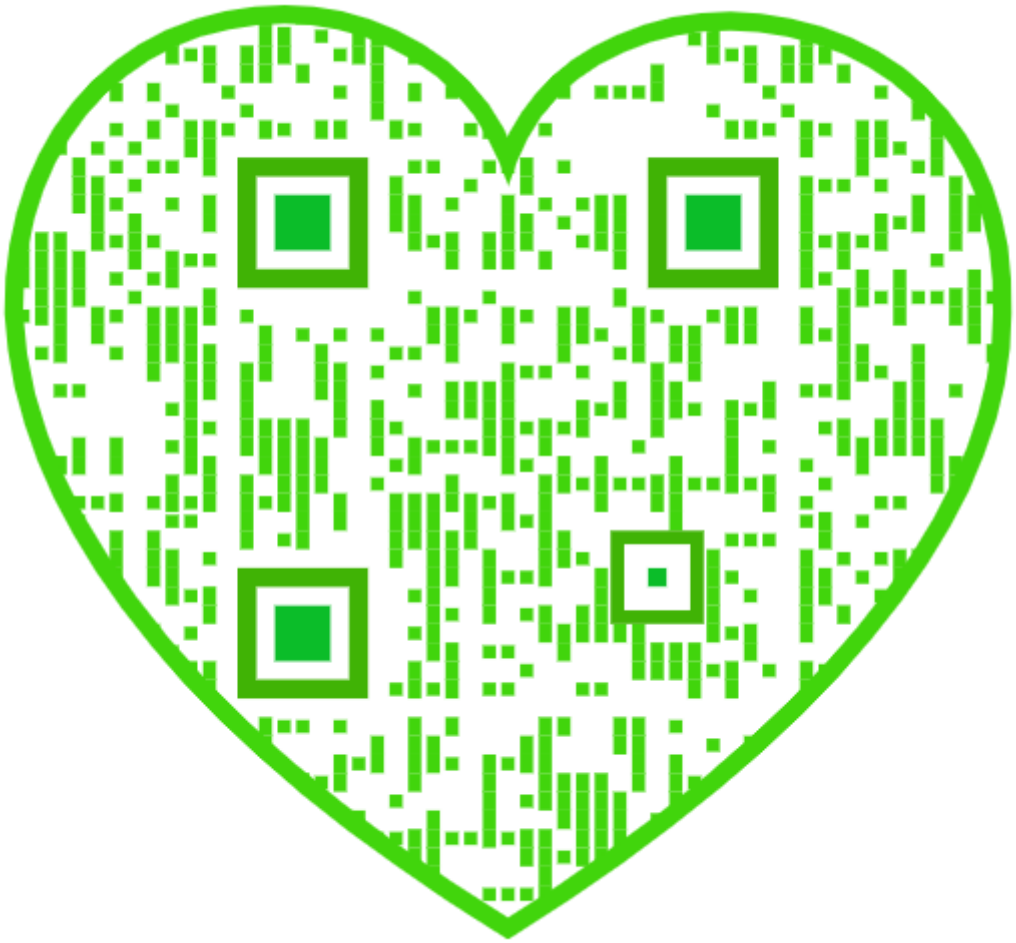

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This volume is respectfully dedicated to

HON. NATHAN GOFF

A genial and noble man
An urbane, upright, and able judge

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PREFACE TO THE SECOND EDITION

THE main object had in mind in this edition has been to modernize thoroughly both the text and references, in order to bring the treatise up to date and to show the great changes in admiralty law which have taken place, both by statute and by judicial decision, since the publication of the first edition.

On account of these changes, much of the first edition has become obsolete, and discussion of questions then unsettled has been obviated by their subsequent settlement.

It is not claimed as a feature of this book that it cites all or any large proportion of cases on a given subject. Nothing is more laborious or difficult than the selection of the references. Frequently the two or three cases cited in a footnote are the survivors of a dozen or more that had to be examined or weighed. The rank of the court, the reputation of the judge, the reasoning and style, all must be considered and balanced. Printing an opinion may render it more accessible, but does not add to its value. There is no alchemy in print to transform a baser metal into gold.

This edition has had the general practitioner in view rather more than the first edition, which was largely intended as a text-book for law schools.

The Table of Illustrative Cases contained in the first edition has been omitted, but many leading cases are printed in capitals throughout the text as a means of directing special attention to them.

Though it is impossible to make the paging of the new edition conform to the old, it has been found feasible to preserve the original numbering of the black-letter sections.

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This will facilitate referring from one edition to the other—a matter of some importance, as the courts have frequently done the author the honor of citing the work.

The author desires to make special acknowledgment to Professor George B. Eager, Jr., of the University of Virginia, for valuable suggestions, and to the publishers for their readiness at all times to aid with all descriptions of labor-saving devices.

NORFOLK, VIRGINIA,
January 12, 1920.

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PREFACE TO THE FIRST EDITION

THE germ of this treatise is a series of lectures on admiralty law, which the author has been giving to the senior law class at Washington and Lee University for the past few years. His experience there has emphasized the need of a text-book on marine law. Probably the lack of such a text-book is the explanation of the scant attention given to the subject in the law schools; but its constantly increasing importance seems now to demand more elaborate treatment than it has heretofore received. This is especially true in view of the recent important legislation bearing upon the subject, and its intimate connection with many other topics which are usually treated more fully, such as the law of carriers and the general substantive law in relation both to contracts and to torts. To meet the need of such a text-book, this treatise has been prepared. It is intended to be elementary, and is so arranged that those schools which give but slight attention to the subject of admiralty can use it by omitting certain chapters, and those which desire to give it more emphasis can supplement the text by the use of the table of leading cases, which are printed in large capitals throughout the book, and for which a special index has been prepared, giving an outline of the points passed upon by them.

The author hopes, also, that the book will be found useful to the very large class of general practitioners who wish to be in position to answer ordinary routine questions of admiralty law arising in practice. The failure of the law schools to treat this subject at any length results in the failure of the young bar generally to know anything about

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it when they first commence to practice. It is hoped that this book will enable them to acquire a bird's-eye view of the subject during those leisure hours which usually fall heavily upon the younger practitioner, and that it will also enable the more experienced general practitioners who do not make a specialty of admiralty to advise, at least on current questions, without the necessity of consulting a specialist.

In view of the elementary character of the work, the author cannot hope that the specialist in admiralty will find anything novel in his treatment of the subject, unless, perhaps, in one or two chapters where the law is not yet crystallized into very definite shape,—such as the chapter on death injuries and the chapter on the subject of damages,—and where the author's views may be of interest. At the same time, it is believed that the insertion in the appendix or in the main text of practically all the statutes which the admiralty practitioner usually needs will make it a useful vade mecum, obviating the necessity of handling, either in the office or at court, the cumbrous volumes in which these statutes are found. A list of the acts printed in full will be found in the index under the title "Statutes."

The author begs leave to express his acknowledgments to many friends for suggestions and aid. He also wishes to acknowledge publicly the numerous courtesies received at the hand of the publishers.

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ORIGIN AND HISTORY

1. The admiralty law originated in the needs of commerce and the custom and usage of merchants.

In the dawn of recorded story, when mythology and history were too intermingled to separate the legendary from the authentic, commerce by means of ships was drawing the nations together, and beginning to break down the barriers of prejudice and hostility due to the difficulty and danger of land communication. The voyage of the Argonauts, the Trojan Expedition, the wanderings of Odysseus, though military in the songs of Homer, were probably as

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much for exploration as for conquest; merchants and warriors were combined in one person of necessity. The enterprising Rhodians had not only a commerce, but a Code, in which is found the germ of the law of general average. The Phœnician traders were carriers for the wise Solomon, and planted trading colonies throughout the Mediterranean. Their Carthagenian descendants were worthy successors. Until Rome copied their trireme, her domain was limited to Italy. When maritime skill supplemented military prowess, and placed at her command new and easier lines of advance, she overran the world. The mart followed the camp; for it is a teaching of history that in the providence of God the havoc of war opens new avenues for the arts of peace.

In the Middle Ages the Italian republics became the carriers of the world, and reached a high plane of enlightenment. The Saracen civilization could compare favorably with that of the West; and the Italians, in their constant warfare against Mohammedanism, acquired and assimilated this civilization, and spread it over Europe. Venice, Florence, Pisa, and Genoa furnished the mariners who scattered the gloom of the Dark Ages; who civilized the old world, and discovered the new.

The Conflict between the English Common Law and Admiralty Courts

The student who observes the present commerce and maritime power of England finds it hard to realize how recent is its development. Yet our English ancestors were not by nature addicted to maritime enterprise. The Anglo-Saxon loved the quiet recesses of the forest, and was reluctant to venture on the water. He could not be made to understand that his only security against the Danes, who harried the British coast, was to meet them at sea. The naval victory of Alfred was sporadic, and the sea power of the Danes enabled them to overrun and conquer England. Even the Danish conquest did not infuse sufficient mari-

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time blood to overcome the Saxon propensity to remain on terra firma. During many months William the Conqueror was engaged in fitting out his fleet and army in sight of their coast, yet no effort was made to harass him on the voyage, or resist his landing. It is difficult to understand that the vanquished of Hastings and the victors of the Hogue were of the same nation.

The Norman conquerors added a sea-faring strain to Anglo-Saxon blood, and the subsequent wars with France developed to some extent a taste for the sea; but, despite the trade with the Baltic nations, the Mediterranean remained the great center of world commerce. The discovery of America directed the gaze of navigators beyond the Pillars of Hercules and made their aspirations worldwide.

Prior to the reign of Elizabeth, many continental nations surpassed England in maritime enterprise. Such were the Spaniards, Portuguese, Dutch, and even the French. She it was who first grasped England's true policy, and the age of Bacon and Shakespeare in letters was the age of Drake and Frobisher and Raleigh in navigation. The disgraceful reign of her successor, James I., brought about a partial reaction. Lord Coke, the apostle of the common law, was the leader in the attack on the admiralty, issuing prohibitions to its courts, and in every way curtailing its jurisdiction. His persecution of Raleigh, the great navigator, was the personification of his hatred for the new order of things.

In consequence of this common-law hostility, English commerce was long retarded, just as was the jurisdiction of the English admiralty. The reigns of the Stuarts up to the English commonwealth were noteworthy for a tendency to cultivate friendly relations with Spain, thus checking the enterprise of the great sea captains who had long made relentless war against her. Charles II. and James II. were more subservient to France than their ancestors had been to Spain, so that the steady growth of English commerce hardly antedates the eighteenth century.

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Meanwhile the common-law judges had put fetters upon the marine law of England which could not be so easily cast off. Anything continental or international in origin met their determined resistance. It was long before the English courts were willing even to admit that the law and custom of merchants, to which England owes its greatness of to-day, was a part of English law; or that it was more than a special custom, necessary to be proved in each case. In consequence of this sentiment, the English admiralty jurisdiction at the time of the American Revolution was much restricted, being narrower than the continental admiralty, and far narrower than the present jurisdiction of the American and English admiralty courts. In England an act of parliament was necessary to enlarge their restricted jurisdiction to its ancient extent.[1] In the United States the same result has been achieved, so far as necessary, by much judicial, and some congressional, legislation.

THE ADMIRALTY CLASSICS

2. The sources of the admiralty law lie in the reason of man as educated by international trade relations, and are evidenced by the great admiralty classics.

The law of the sea is not the product of any one brain, or any one age. It is the gradual outgrowth of experience, expanding with the expansion of commerce, and fitting itself to commercial necessities. It is practically a branch of the law merchant, on account of their intimate connection;

§ 1. [1] The modern English admiralty jurisdiction is regulated by statute. The principal are: 3 & 4 Vict. c. 65; 17 & 18 Vict. c. 104, § 476; 24 & 25 Vict. c. 10; 31 & 32 Vict. c. 71; and 32 & 33 Vict. c. 51. They will be found in the Appendix to Abbott's Law of Merchant Ships and Seamen. The admiralty jurisdiction, while much extended by these enactments, still differs sharply from the American admiralty jurisdiction. Some of these differences will be pointed out in other connections.

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and grew, not from enactment, but from custom; not from the edicts of kings, but from the progressive needs of society.

The Ancient Codes and Commentators

Yet there are various compilations and treatises which evidence the maritime law of their respective dates, and are valuable for reference, because they did not originate the provisions on the subject, but reduced to concrete form the customs and practices which had grown up independent of codes and commentators. These are the great classics of marine law, which occupy to it the relation that Bacon's Abridgment or Coke's and Blackstone's writings bear to the common law of England.

The Roman Civil Law contains many provisions regulating the rights and responsibilities of ships.

The Digest quotes from the ancient Rhodian Code its provision as to contribution of interests in general average. It contains provisions also in relation to the liability of vessels for injury to cargo, for punishment of thieves and plunderers, and for borrowing on bottomry or respondentia.[2]

The Consolato del Mare is a collection of marine laws antedating the fifteenth century, though neither its author nor its date is known. It is probably a compilation of the marine customs then in vogue among the trading nations of Europe, and may be found in the collection of maritime laws made by Pardessus.

The Laws of Oleron take their name from the island of Oleron off the French coast, and show the customs then prevailing in respect to many of the most important subjects relating to shipping. They are supposed to have been compiled under the direction of Eleanor of Aquitaine, who, as queen, first of France and then of England, and as regent of the latter during the absence of her son Richard

§ 2. [2] Dig. 14, 2; 4, 9; 22, 2; 47, 5; 47, 9.

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Cœur de Lion on the Crusades, was impressed with the importance of such a work.

The Laws of Wisbuy, a city of the island of Gothland, in the Baltic, are similar to the Laws of Oleron, and were probably based upon them.

The Ordonnance de la Marine of Louis XIV vindicates France from the charge that her people are not fitted for maritime enterprise. It was published in 1681, and is a learned and accurate digest of marine law and usages, and the best evidence to this day of the extent and nature of the admiralty jurisdiction.

The Laws of Oleron, the Laws of Wisbuy, and the Ordonnance were printed as an appendix to Peters' Admiralty Decisions. They have been reprinted, along with the Laws of the Hanse Towns and other interesting matter of the same sort, as an appendix to volume 30 of the Federal Cases, thus rendering them easily accessible.

In 1760, Valin, a distinguished advocate of Rochelle, published a commentary on the Ordonnance, in two quarto volumes, which ranks in authority as high as the Ordonnance itself.

Cleirac, another French writer, published at Bordeaux, about the middle of the seventeenth century, his work "Us et Coustumes de la Mer," which contains the Laws of Oleron, of Wisbuy, of the Hanse Towns, and many other continental provisions, with valuable annotations of his own.

The treatise of Roccus "De Navibus et Naulo," the writings of Casaregis on mercantile subjects, and those of Pothier in the same field, especially that on maritime hiring, are equal in authority to any of those previously named.[3]

[3] An instructive account of the ancient admiralty classics and of their relative value will be found in Mr. Justice Story's Review of Jacobsen's Laws of the Sea, first published in the North American Review in 1818, and his Review of Phillips on Insurance, first published in the North American Review, 1825. These were reprinted

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The English Authorities

Selden's Mare Clausum (1635), Godolphin's View of the Admiral Jurisdiction (2d Ed. 1685), the productions of Sir Leoline Jenkins (partly found in Wynne's Biography of him published in 1724), and the second volume of Browne's lectures on the Civil and Admiralty Law give a view of the development of the admiralty law in England and its subsequent restriction by the warfare of the common-law judges.

More recently the publication by the Selden Society of the two volumes of Select Pleas in Admiralty has thrown a flood of light on the early history of the English admiralty system. These two volumes came out in 1894 and 1897 and constitute volumes 6 and 11 of the publications of the Society, but are numbered independently. The introductions to the two volumes by Mr. R. G. Marsden are a priceless contribution to the literature on the subject. The introduction to the third edition of Roscoe's Admiralty by Mr. T. L. Mears (reprinted in volume 2, p. 312, of Select Essays in Anglo-American Legal History) will well repay careful perusal; and the first chapter of the recent work of Mr. E. C. Mayers on Admiralty Law and Practice in Canada (Carswell Co., Ltd., Toronto, 1916) is a useful discussion of the later English admiralty jurisdiction in the light of the more recent publications.

The value of many recent English treatises to the student or practitioner is diminished by the space given to the discussion of statutes. But the later editions of Abbott on Shipping, Arnould on Marine Insurance, Carver on Carriage by Sea, Kennedy on Merchant Salvage, Marsden on Collisions, and Scrutton on Charter Parties are of great assistance.

in the collection of his Miscellaneous Writings published by Munroe, Boston, 1835, at pages 245 and 294, respectively. See, also, his Inaugural Address as Dane Professor of Law at Harvard, pages 440, 470, of the same work.

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The American Authorities

In the United States the marine classics are mainly decided cases. The only treatise covering the whole field is the excellent two-volume work of Parsons on Shipping and Admiralty, which cannot be commended too highly. Its only fault is that it was published fifty years ago. There are other good works on separate departments of marine law; such as Marvin's work on Salvage, Dunlap's Admiralty Practice, Betts' Admiralty Practice, Spencer's work on Collisions, and especially Benedict's treatise on Admiralty Practice, which is indispensable on the subject of which it treats.

As to the European codes and works above named, it must be borne in mind that they are only persuasive authority. They are evidence of the general maritime law, and not necessarily of our maritime law, except in so far as they have been adopted by us. As was said by Mr. Chief Justice Tilghman in an early Pennsylvania case: "They and the commentators on them have been received with great respect both in the courts of England and the United States, not as conveying any authority in themselves, but as evidence of the general marine law. When they are contradicted by judicial decisions in our own country, they are not to be regarded, but on points which have not been decided they are worthy of great consideration." [4]

[4] Morgan & Price v. Insurance Co. of North America (1807) 4 Dall. 455, 1 L. Ed. 907, cited in 30 Fed. Cas. 1203. See, also, LOTTAWANNA, 21 Wall. 558, 22 L. Ed. 654; Scotland, 105 U. S. 24, 26 L. Ed. 1001; Elfrida, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413.

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THE COLONIAL ADMIRALTY JURISDICTION, AND CONSTITUTIONAL GRANT OF "ADMIRALTY AND MARITIME JURISDICTION"

3. The grant of "admiralty and maritime jurisdiction" to the federal courts in the Constitution means the jurisdiction exercised by the colonial and state admiralty courts, and not the narrower jurisdiction of the English courts.

Prior to the Revolution, the several colonies had admiralty courts by virtue of commissions from the crown. These commissions conferred a jurisdiction much wider than that of the same courts in the mother country.[5]

On the Declaration of Independence, each colony became a separate nation, and organized its own system of courts. Although the abuses of power in revenue matters had been one of the grievances which led to the Revolution, and contributed an indignant sentence to the Declaration of Independence, the different colonies practically adopted the jurisdiction of the colonial vice admiralty courts for their own, impressed by its advantages to their nascent shipping; and they disregarded the confined limits of the British marine tribunals. The Virginia statute of 1779 is a good illustration:

"Be it enacted by the general assembly, that the court of admiralty, to consist of three judges, any two of whom are declared to be a sufficient number to constitute a court, shall have jurisdiction in all maritime causes, except those wherein any parties may be accused of capital offenses, now depending and hereafter to be brought before them, shall take precedence in court according to the order in time of their appointment, and shall be governed in their proceed-

§ 3. [5] An idea of its extent may be gathered from Lord Cornbury's vice admiral's commission, set out in extenso in section 124 et seq., Ben. Adm.

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ings and decisions by the regulations of the Congress of the United States of America, by the acts of the general assembly, by the Laws of Oleron and the Rhodian and Imperial Laws, so far as they have been heretofore observed in the English courts of admiralty, and by the laws of nature and of nations." [6]

These courts were in active operation from the date when the colonies declared their independence in 1776 to the adoption of the Constitution in 1789.

THE WATERS INCLUDED

4. The waters included in the admiralty jurisdiction are all waters, whether tidal or not, navigable for commerce of a substantial character.

Repudiation of Ancient Tidal Test for Test of Navigability.

Article 3, § 2, of this instrument extended the judicial power of the United States, inter alia, "to all cases of admiralty and maritime jurisdiction." It was long assumed without examination that the measure of the jurisdiction referred to in this clause was that of the English admiralty courts at the time of the Revolution. Their standard was the reach of the tides. In the contracted islands of the mother country there were no navigable waters that were not tidal. And so, when the question first came before the Supreme Court, it decided that the domain of the American admiralty was bounded by the ebb and flow of the tide.[7] But this rule soon became embarrassing. In Peyroux v. Howard [8] the court found itself gravely discussing whether a slight swell at New Orleans could properly be called a tide. Our early statesmen, living in weak communities strung along the Atlantic Coast, did not realize the possi-

[6] 10 Hen. St. p. 98.

§ 4. [7] Thomas Jefferson, 10 Wheat. 428, 6 L. Ed. 358.

[8] 7 Pet. 342, 8 L. Ed. 700.

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bilities of the boundless West, inaccessible from its barrier of mountains and savages. Jay, our first Chief Justice, had been willing to barter away the navigation of the Mississippi, and even to restrict the export of cotton, which laid the foundation of our national wealth. The mighty rivers and their tributaries which gave access to a continent, the Great Lakes of our northern border, which had witnessed some of our most notable feats of arms, were by this tidal test relegated to a place with the English Cam and Isis—not wide enough for a boat race. The restriction could not be endured, and so the court gradually broke away from English traditions. In Waring v. Clarke [9] it decided that our Constitution did not mean to adopt the English standard, and that the admiralty could take cognizance of controversies maritime in their nature, though they arose in the body of a county. This first step was but a preliminary to entire emancipation, and its corollary was THE GENESEE CHIEF,[10] which repudiated the tidal test entirely, and held that the true criterion of jurisdiction was whether the water was navigable.

Since then the court has frequently said that the grant of jurisdiction in the Constitution referred, as to subject-matter, not to the curtailed limits of the English admiralty, but to the system with which its framers were familiar; and this was the colonial and state admiralty, which was practically coincident with the ancient continental admiralty.[11]

What are Navigable Waters

It is not easy to say as matter of law exactly what waters are navigable in this sense. Care must be taken to distinguish between the clause granting the admiralty jurisdiction to the federal courts and the clause granting to congress the power to regulate interstate and foreign com-

[9] 5 How. 441, 12 L. Ed. 226.

[10] 12 How. 443, 13 L. Ed. 1058.

[11] LOTTAWANNA, 21 Wall. 558, 22 L. Ed. 654; Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373.

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merce. The Supreme Court has frequently said that they are independent of each other. Yet the admiralty jurisdiction is at least as extensive as the commercial clause. It extends to waters constituting actually or potentially a link in interstate commerce and navigable by craft of sufficient bulk to be engaged in interstate commerce, though such waters lie entirely within the limits of a state and above tide water, and though the voyage be between ports of the same state.[12]

Under the commerce clause the phrase "navigable waters" has been often considered. THE DANIEL BALL[13] was a proceeding against a steamer for violating the federal license laws. She navigated entirely within the state of Michigan, on a short river, and drew only two feet of water. The river emptied into Lake Michigan. In the course of the opinion the court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

In Leovy v. U. S.[14] the court upheld an act of the Louisiana Legislature authorizing the damming of a small bayou

[12] IN RE GARNETT, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631; Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274.

[13] 10 Wall. 557, 19 L. Ed. 999.

[14] 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914.

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for the purpose of reclaiming the lands bordering thereon. It was shown that only fishermen and oyster boats used it. The court said that, in order to be public navigable waters, there should be "commerce of a substantial and permanent character conducted thereon."

The admiralty jurisdiction does not extend over the waters of a lake entirely within the borders of a state, and without any navigable outlet. In United States v. Burlington & Henderson County Ferry Co.[15] Judge Love seems to think that such waters are without the admiralty jurisdiction, though the point was not directly involved. In Stapp v. The Clyde [16] the question was necessarily involved, and the court decided that such waters were not of admiralty cognizance.

Artificial as well as natural water ways come within the jurisdiction of the admiralty. In The Oler [17] this was decided as to the Albemarle and Chesapeake Canal. Afterwards, in Ex parte Boyer,[18] the Supreme Court upheld the jurisdiction in the case of a collision between two canal boats on the Illinois and Lake Michigan Canal, an artificial Canal entirely within the limits of a state, but forming a link in interstate communication, though the vessels themselves were on voyages beginning and ending in the state.

[15] (D. C.) 21 Fed. 331.

[16] 43 Minn. 192, 45 N. W. 430. See, also, Rockaway, 156 Fed. 692; Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73. They are certainly not within the commerce clause of the Constitution. Veazie v. Moor, 14 How. 568, 14 L. Ed. 545. Moore v. American Transp. Co., 24 How. 1, 16 L. Ed. 674.

[17] 2 Hughes, 12, Fed. Cas. No. 10,485.

[18] 109 U. S. 629, 3 Sup. Ct. 434, 27 L. Ed. 1056. See, also, Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73.

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THE CRAFT INCLUDED

5. The character of craft included in the admiralty jurisdiction is any movable floating structure capable of navigation and designed for navigation.

The evolution of the ship from the dugout or bark canoe to the galley with gradually increasing banks of oars, then to the sail vessel with masts and sails constantly growing and replacing the human biceps, then to the self-propelling steamers, reckless of ocean lanes and calm belts, is one of the miracles of progress. As to all of these the jurisdiction of the admiralty is clear. But hardly less important, at least in local commerce, are the various nondescripts which dot our harbors, like lighters, rafts, car floats, floating docks, dredges, and barges with no motive power aboard.

Here, again, it must be remembered that the admiralty clause of the Constitution, and not the commerce clause, is being considered. A vessel need not necessarily be engaged in commerce to come within the jurisdiction, though, if it was, the jurisdiction would be clear. The true test is capability of navigation and the animus navigandi. The very same structure, when permanently attached to the shore, and thereby becoming a practical extension of the shore, without any intent of moving, might be out of the jurisdiction; and yet, if temporarily attached, and designed to be shifted from place to place by water, it might be within the jurisdiction.

The leading case on this subject is COPE v. VALLETTE DRY-DOCK CO.[19] There the court held that the jurisdiction did not include a floating dry dock permanently attached to the shore at New Orleans, and not intended for navigation. It had been moored to the same place for twenty years. Had it been designed to be towed around to different places in the harbor, that would have

§ 5. [19] 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501.

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been navigation sufficient, and in such case the court would probably have taken jurisdiction. It is difficult to reconcile with this the case of Woodruff v. One Covered Scow,[20] in which Judge Benedict took jurisdiction of a floating boathouse permanently attached to a wharf to afford access to shore for persons from small boats. As the Vallette Dry-Dock Case was only decided on January 10, 1887, and this case on February 18, 1887, it is likely that the former was not known to Judge Benedict.

Under the jurisdiction are included lighters of the simplest kind, for they are considered to "appertain to travel or trade or commerce." [21]

A floating elevator, used for the storage of grain, but designed to be moved from place to place in a harbor, is included.[22]

There are many cases extending the jurisdiction over dredges, both those which lift the mud by dippers, and deposit it in scows to be towed away, and those which work on a sucking principle, drawing the mud from the bottom, and delivering it on shore by long lines of pipe.[23]

The same is true of floating movable derricks, and pile drivers.[24]

On the other hand, a marine pump dredge, capable of being moved from place to place, but resting on piles, and

[20] (D. C.) 30 Fed. 269.

[21] General Cass, 1 Brown, Adm. 334, Fed. Cas. No. 5,307; Wilmington (D. C.) 48 Fed. 566.

[22] Hezekiah Baldwin, 8 Ben. 556, Fed. Cas. No. 6,449.

[23] Saylor v. Taylor, 23 C. C. A. 343, 77 Fed. 476; McRae v. Dredging Co. (C. C.) 86 Fed. 344; Mac, 7 P. D. 126; Richmond Dredging Co. v. Standard American Dredging Co., 208 Fed. 862, 126 C. C. A. 20.

[24] Maltby v. A Steam Derrick, 3 Hughes, 477, Fed. Cas. No. 9,000; Lawrence v. Flatboat (D. C.) 84 Fed. 200; Southern Log Cart. & Supply Co. v. Lawrence, 30 C. C. A. 480, 86 Fed. 907; Raithmoor (D. C.) 186 Fed. 849 (reversed on another point, not affecting this question, 241 U. S. 166, 36 Sup. Ct. 514, 60 L. Ed. 937).

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not floating, has been held to be excluded from admiralty cognizance.[25]

In The Public Bath No. 13[26] Judge Brown held that a bath house built on boats, and made to shift from place to place, is within the jurisdiction. This, and U. S. v. Burlington & Henderson County Ferry Co.,[27] are good illustrations of cases where the courts treat navigability irrespective of trade or commerce as the proper test of the admiralty jurisdiction in contradistinction to the powers of Congress under the commerce clause of the Constitution.

Judge Cushman has recently held that an aeroplane is not a subject of admiralty jurisdiction.[28]

In construing the meaning of the word "ship" under the English statutes conferring jurisdiction on the admiralty courts, the House of Lords has held that a floating gas buoy, which had been broken loose, and had been saved, could not be libeled for salvage, as it was not designed either for navigation or for use in commerce.[29]

The Hendrick Hudson[30] was a dismantled steamer, which was being used as a hotel. While being towed to another place, it was in peril, and salvage services were rendered to it. The court held that it was not within the cognizance of the admiralty.

This decision would seem to be out of line with the more recent authorities. Whether the structure was a hotel or a steamboat, it was engaged in actual navigation. Had the Vallette Dry Dock been so engaged, the Supreme Court would probably have sustained the jurisdiction.

[25] Big Jim (D. C.) 61 Fed. 503.

[26] (D. C.) 61 Fed. 692.

[27] (D. C.) 21 Fed. 331.

[28] Crawford Bros. No. 2 (D. C.) 215 Fed. 269.

[29] Gas Float Whitton No. 2, [1897] A. C. 337. But the English courts have sustained jurisdiction over a hopper barge. Mudlark, [1911] P. 116.

[30] 3 Ben. 419, Fed. Cas. No. 6,355.

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A ship becomes such at her launching. Prior thereto she is a mere congeries of wood and iron.[31]

Rafts

Whether a raft is such a structure as to come under the jurisdiction cannot be considered settled. The Vallette Dry-Dock Case seems, in its reasoning, to assume that ships and cargoes of ships alone come under the jurisdiction, and that floating merchandise, never in any way connected with a ship, is not included. Yet in its concluding paragraph it mentions the case of rafts, and cites several well-considered decisions sustaining the jurisdiction, but without expressing either approval or disapproval.

In Seabrook v. Raft of Railroad Cross-Ties,[32] Judge Simonton, in sustaining jurisdiction, says that rafts were the original methods of water locomotion. As they are navigated, and designed to be navigated, and not tied permanently to one place, like a dry dock, the weight of reasoning is in favor of the jurisdiction in such case.

[31] Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264; North Pacific S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U. S. 119, 39 Sup. Ct. 221, 63 L. Ed. 510.

[32] (D. C.) 40 Fed. 596. See, also, Mary (D. C.) 123 Fed. 609; Gas Float Whitton No. 2, [1897] A. C. 337.

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CHAPTER II

OF THE ADMIRALTY JURISDICTION AS GOVERNED BY THE SUBJECT-MATTER

6. Cases in Contract and Cases in Tort.
7. Tests of Jurisdiction.
8–10. Contracts of Seamen.
11. Master's Right to Proceed in Rem for His Wages.
12–19. Pilotage.

CASES IN CONTRACT AND CASES IN TORT

6. The sources of admiralty jurisdiction, as in other branches of substantive law, naturally subdivide into rights arising out of contract and rights arising out of tort.

(a) Rights arising out of contract are maritime when they relate to a ship as an instrument of commerce or navigation, intended to be used as such or to facilitate its use as such.

(b) Rights arising out of tort are maritime when they arise on public navigable waters.

7. TESTS OF JURISDICTION—The test of jurisdiction is different in each of these classes of cases.

(a) The test in contract cases is the nature of the transaction.

(b) The test in tort cases is the locality.

In the warfare made by the common law upon the admiralty courts, one line of attack was the contention that only contracts were maritime which were made upon the sea, and to be performed upon the sea; thus attempting to apply to contractual rights, as well as torts, the test of locality. Under the English decisions this distinction excluded many subjects of marine cognizance which the Con-

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tinental admiralty covered. In some of the earlier decisions of this country traces of this distinction may also be found. But it is now settled that the test in matters of contract is irrespective of locality, and depends upon the nature of the transaction. In England itself the restriction became so intolerable that an act of parliament was necessary, and accordingly the acts defining the jurisdiction of the admiralty courts largely restored the ancient admiralty jurisdiction of the English courts.

What Contracts Are Maritime by Nature

The courts have in many instances said whether certain particular controversies were maritime or not, but no satisfactory definition has yet been enunciated which will enable the student to say in advance whether a given case is marine or not. In DE LOVIO v. BOIT,[1] Mr. Justice Story, in holding that contracts of marine insurance are within the admiralty jurisdiction, discusses with great learning the early extent of that jurisdiction, naming in more than one connection the general subjects which writers and codifiers had enumerated, and says that it includes "all transactions and proceedings relative to commerce and navigation"; also "all contracts which relate to the navigation, business, or commerce of the sea."

In New England Marine Ins. Co. v. Dunham [2] the court says: "The true criterion is the nature and subject-matter of the contract as to whether it was a maritime contract, having reference to maritime services or maritime transactions."

In Zane v. The President,[3] Mr. Justice Washington says: "If the subject-matter of a contract concerned the navigation of the sea, it is a case of admiralty and maritime jurisdiction, although the contract be made on land." The case was a proceeding by a material man.

§§ 6-7. [1] 2 Gall. 398, Fed. Cas. No. 3,776.
[2] 11 Wall. 1, 20 L. Ed. 90.
[3] 4 Wash. C. C. 453, Fed. Cas. No. 18,201.

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Wortman v. Griffith [4] was a suit by the owner of a shipyard for the use of his marine ways by the vessel. Mr. Justice Nelson decided that the admiralty had jurisdiction, saying: "The nature of the contract or service, and not the question whether the contract is made or the service is rendered on the land or on the water, is the proper test in determining whether the admiralty has or has not jurisdiction."

Under the test as laid down, the fact that a ship may be incidentally connected with the transaction does not make the matter maritime.

In Ward v. Thompson [5] there was an agreement between certain parties to carry on a trade venture, one contributing a vessel and the other his skill and labor, on the basis of a division of profits on a fixed ratio. The court held that this was nothing but an ordinary common-law agreement of partnership, and was not made maritime by the fact that a ship was part of the partnership property.

On the same principle a traffic agreement between a railroad company and the owner of a number of steamers to operate as a through line of transportation, dividing the receipts, is not maritime.[6]

Bogart v. The John Jay [7] was a proceeding in admiralty

[4] 3 Blatchf. 528, Fed. Cas. No. 18,057. See, also, North Pac. S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U. S. 119, 39 Sup. Ct. 221, 63 L. Ed. 510.

[5] 22 How. 330, 16 L. Ed. 249.

[6] Graham v. Oregon R. & Nav. Co. (D. C.) 134 Fed. 454.

[7] 17 How. 399, 15 L. Ed. 95. In England, independent of statute, admiralty had no jurisdiction to enforce a mortgage. By 3 & 4 Vict. c. 65, § 3 the mortgagee was allowed to intervene when the ship was under arrest in a case of which the court had jurisdiction. And by 24 Vict. c. 10, § 11, any duly registered mortgagee was allowed to institute an independent proceeding. Mayer, Admiralty Law & Pr. 70; Atalanta, 5 Can. Ex. 57. As Parliament is not bound by the limitations of a written constitution, it can make a thing marine by statute which is not so by nature. But the grant of admiralty jurisdiction in this country is constitutional, and Congress could hardly

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to foreclose a mortgage on a vessel. There was nothing to show that the money had been borrowed for any purpose connected with the use of the vessel, and the only connection the vessel had with it was the fact that it was his security for the debt, just as any other piece of personal property might have been. It was held that admiralty had no jurisdiction.

In Minturn v. Maynard [8] the Supreme Court decided that an admiralty court had no jurisdiction of mere matters of account, though they were accounts relating to a ship.

In the Illinois [9] a party had leased the privilege of running a bar on a passenger steamer plying between Memphis and Vicksburg. When the vessel fell into trouble, and was libeled by some other creditor, he, too, came into the admiralty court, and claimed that this was, in effect, a charter of part of the vessel, and that he had a remedy in admiralty. The court, however, could not see that a transaction of this sort had any maritime characteristics, and decided that there was no jurisdiction.

In Doolittle v. Knobeloch [10] the owner of a vessel had employed the libelant to purchase a steamer for him, and to look generally after his interests in bringing the steamer from New York to Charleston, though not in connection with any navigation of the vessel. He attempted to collect his money by a proceeding in rem against the vessel and in

give a mortgagee the right to institute an independent proceeding in view of the decision of the Supreme Court that such a right is not by nature maritime.

The right to intervene in a proceeding by a holder of a maritime right of action is conferred by rule 43 of the Supreme Court, and rests on a different basis.

[8] 17 How. 477, 15 L. Ed. 235; Zillah May (D. C.) 221 Fed. 1016. Here, too, express jurisdiction has been conferred in England by 24 Vict. c. 10, § 8, as to registered ships. Lady of the Lake, L. R. 3 A. & E. 29.

[9] 2 Flip. 383, Fed. Cas. No. 7,005.

[10] (D. C.) 39 Fed. 40. But an agreement to undertake the responsibility of navigating a vessel back to her home port is maritime. Laurel (D. C.) 113 Fed. 373.

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personam against the owner. The court decided that it was not an admiralty contract.

If the principal contract is maritime, jurisdiction is not ousted by the fact that some incidental question growing out of it would not be maritime in case it stood alone.[11]

On the other hand, preliminary contracts looking to a formal contract are not maritime, though the contract itself, when executed, may be so. For instance, a contract of charter party partly performed is maritime; but a preliminary agreement to make a contract of charter party is not maritime.[12]

The same transaction may be maritime in one case and not maritime in another. As emphasizing this distinction, there is the maxim that "a ship is made to plough the seas, and not to lie at the walls." Hence, wharfage rendered to a ship while loading or unloading, or in her regular use as a freight-earning enterprise, is a maritime contract.[13]

On the other hand, wharfage to a ship laid up for the winter while waiting for the season to open is not maritime.[14]

This distinction is further illustrated by the decisions in relation to watchmen on vessels. Those who are watchmen while vessels are in port during voyages are considered as having made a maritime contract, but those who have charge of her while laid up have no such contract.[15]

[11] Charles F. Perry, 1 Low. 475, Fed. Cas. No. 2,616; Nash v. Bohlen (D. C.) 167 Fed. 427.

[12] Andrews v. Essex Fire & Marine Ins. Co., 3 Mason, 6, Fed. Cas. No. 374; Tribune, 3 Sumn. 144, Fed. Cas. No. 14,171; Oakes v. Richardson, 2 Low. 173, Fed. Cas. No. 10,390; Eugene, 87 Fed. 1001, 31 C. C. A. 345; Steamship Overdale Co. v. Turner (D. C.) 206 Fed. 339.

[13] Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373; Braisted v. Denton (D. C.) 115 Fed. 428.

[14] C. Vanderbilt (D. C.) 86 Fed. 785. Wharfage in its proper sense must not be confused with rent due for the lease of a wharf. This latter is not maritime, being simply a contract relating to real estate. James T. Furber (D. C.) 157 Fed. 126.

[15] Erinagh (D. C.) 7 Fed. 231; Fortuna (D. C.) 206 Fed. 573.

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CONTRACTS OF SEAMEN

8. Every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board a vessel shall be deemed and taken to be a seaman.

9. Seamen are the wards of the admiralty, and have a prior claim for their wages.

10. Their contracts are governed by the ordinary rules of contract except as modified by statute, and by the disposition of the courts to guard them against imposition.

The contracts of seamen have always been considered among the most important in the admiralty, as a good crew is the most important outfit that a ship can have. Her construction may be the best that modern ingenuity may produce. Yet, unless she has a brain to direct her course, and skillful hands to regulate the pulsations of her engines and manage her numerous complicated machinery, her propeller is paralyzed, her siren is dumb. It is not the gun, but the man behind it, that is formidable; and in modern as in ancient times the personal equation is still controlling. On this account the utmost encouragement and the fullest protection to seamen are the established policy of the admiralty law.

Who are Seamen

As the courts have been liberal in their construction of the word "ship," they have been equally so in deciding what constitutes a "seaman," in the modern sense. The term is not limited to those who actually take part in the navigation of the ship. Every one who is regularly attached to the ship, and contributes to her successful handling, is a seaman, though he may not know one rope from another.

The definition above given is the exact language of sec-

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tion 4612 of the Revised Statutes as amended.[16] For instance, as a dredge has been considered a ship, so the men who operate it are held to be seamen.[17]

Fishermen and sealers, who go for that purpose, are held to be seamen, though they may do other incidental work.[18]

The wife of the cook, engaged by the master as second cook, is a mariner in this sense.[19] So, too, the clerk of a steamboat.[20] So, too, a bartender.[21] So as to the ship's steward.[22] And the wireless operator.[23]

On account of the peculiar character of seamen, the courts scrutinize closely their contracts, in order to protect them from imposition. They are improvident and wild, easily imposed upon, and the constant prey of designing men. Their rights, in modern times, are largely governed by statute. In the United States the statutory provisions regulating them are contained in sections 4501–4612 of the Revised Statutes. This codification of the law in relation to them, however, has been much amended and liberalized by subsequent legislation. The acts modifying them will be found in the notes.[24] A detailed discussion of the par-

§§ 8–10. [16] U. S. Comp. St. § 8392.

[17] Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343; Ellis v. U. S., 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589.

[18] Minna (D. C.) 11 Fed. 759; Ocean Spray, 4 Sawy. 105, Fed. Cas. 10,412; Domenico v. Alaska Packers' Ass'n (D. C.) 112 Fed. 554; Alaska Packers' Ass'n v. Domenico, 117 Fed. 99, 54 C. C. A. 485; North Alaska Salmon Co. v. Larsen, 220 Fed. 93, 135 C. C. A. 661.

[19] James H. Shrigley (D. C.) 50 Fed. 287.

[20] Sultana, 1 Brown, Adm. 13, Fed. Cas. No. 13,602.

[21] J. S. Warden (D. C.) 175 Fed. 315.

[22] Pacific Mail S. S. Co. v. Schmidt, 214 Fed. 513, 130 C. C. A. 657.

[23] Buena Ventura (D. C.) 243 Fed. 797.

[24] Act June 9, 1874 (18 Stat. 64); Act June 26, 1884 (23 Stat. 53); Act June 19, 1886 (24 Stat. 79); Act Aug. 19, 1890 (26 Stat. 320); Act Feb. 18, 1895 (28 Stat. 667); Act March 3, 1897 (29 Stat. 687);

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ticular effect of those amendments is impracticable for want of space.

Statutory Provisions

The first provisions relate largely to the method of their engagement, requiring shipping articles carefully prepared and publicly executed, and providing penalties for the violation of such articles. In cases of ambiguity in construing these articles, the courts lean in favor of the seamen.[25]

The next class of provisions relates to seamen's wages and effects. It was an old maxim of the English admiralty law that "freight is the mother of wages," though there were many exceptions to it, and its true limits have not been always understood. This rule no longer prevails in the United States under the statutory provisions referred to. The ancient rule and its limitations may be seen from the opinion of Mr. Justice Woodbury in the Niphon's Crew.[26]

In order to protect a seaman from imposition, the statutes render void any agreement by him waiving any remedies for his wages, and forbid any assignment or attachment of them.[27]

Under the same policy, disproportionate advances to seamen beyond wages earned are made unlawful. The act goes so far as to forbid such advances in our ports to seamen in foreign ships, though it has been held inapplicable

Act December 21, 1898 (30 Stat. 755). Act March 4, 1915 (38 Stat. 1164), known as the La Follette Act, materially changes the above in the interest of seamen. As modified, they are collected in title LIII of the U. S. Comp. St. §§ 8287–8392a.

[25] Wope v. Hemenway, 1 Spr. 300, Fed. Cas. No. 18,042; Catalonia (D. C.) 236 Fed. 554.

[26] Brunner, Col. Cas. 577, Fed. Cas. No. 10,277.

[27] Despite earlier conflict of authority, it is now settled that this applies not only to preliminary attachments, but to garnishments or supplementary proceedings after judgment. Wilder v. Inter-Island Steam Nav. Co., 211 U. S. 239, 29 Sup. Ct. 58, 53 L. Ed. 164, 15 Ann. Cas. 127.

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to advances in foreign ports, whether to American or foreign ships.[28]

Under the practice of the admiralty courts, a seaman is not required to give the usual stipulation for costs when he libels a vessel.[29] But, in order to protect the vessel from being arrested on frivolous charges, the law requires that, before issuing any libel, he must cite the master to appear before a commissioner to show cause why process should not issue. The commissioner thereupon holds a sort of preliminary examination, and issues process if he thinks there is sufficient justification for it.[30]

The statutes also contain elaborate provisions for the seaman's discharge, and for his protection in relation to the character of the vessel, the character of the food and medicine furnished, his clothing, etc., for which reference must be made to the statutes.

Priority of Lien

Under the same policy, the admiralty courts have always held that, as a general rule, the wages of seamen constitute among contract claims the first lien upon the ship, and adhere to it as long as a plank is left afloat.[31]

There may be circumstances in which other liens would be preferred to seamen's wages, as where salvors bring a ship in, and thereby save the ship for the seamen as well as others; but these cases are exceptional, and cannot be discussed, at least in this connection, in detail.[32]

[28] Act March 4, 1915, §§ 4, 11 (U. S. Comp. St. §§ 8322, 8323); Sandberg v. McDonald, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200; Neilson v. Rhine Shipping Co., 248 U. S. 205, 39 Sup. Ct. 89, 63 L. Ed. 208; Pinna (D. C.) 252 Fed. 203.

[29] Act July 1, 1918, c. 113, § 1 (U. S. Comp. St. Ann. Supp. 1919, § 1630a).

[30] Rev. St. U. S. §§ 4546, 4547 (U. S. Comp. St. §§ 8335, 8336).

[31] Ocean Spray, 4 Sawy. 105, Fed. Cas. No. 10,412.

[32] Relf v. The Maria, 1 Pet. Adm. 186, Fed. Cas. No. 11,692. See post, pp. 380, 393.

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Enforcing Obedience

In one respect the contracts of seamen vary materially from ordinary contracts. The general rule in the usual contracts of hiring is that suit or discharge is the only remedy for its violation. On the other hand, the importance of preserving discipline upon a vessel, and of performing the services necessary for her protection, and for the protection even of life, justified the master, under the law as it long prevailed, in using physical force to a reasonable extent in order to enforce obedience. He could inflict blows for the purpose of compelling obedience to an order, or put mutinous seamen in irons or in confinement as a punishment, or forfeit their wages for misconduct. In fact, under exceptional circumstances of aggravation, he might take life. But the other officers of the ship could not punish for past offenses. They could only use a reasonable amount of force to compel obedience.[33]

But under the recent legislation all forms of corporal punishment are prohibited, and the only punishment that the master can inflict for disobedience of orders is to put the seaman in irons till the disobedience ceases, or put him on bread and water for a limited time. He can no longer have a deserter apprehended, but the only punishment for desertion is total or partial forfeiture of wages and effects.[34]

Seamen of Foreign Vessel

As a rule, the court will not take jurisdiction in controversies between the seamen of a foreign ship and her master or the ship. Many of the countries have express treaty stipulations giving sole cognizance of these disputes to their

[33] U. S. v. Alden, 1 Spr. 95, Fed. Cas. No. 14,427; Relf v. The Maria, 1 Pet. Adm. 186, Fed. Cas. No. 11,692; Turner's Case, 1 Ware, 77, Fed. Cas. No. 14,248; Macomber v. Thompson, 1 Sumn. 384, Fed. Cas. No. 8,919; ROBERTSON v. BALDWIN, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715; Stout v. Weedin (D. C.) 95 Fed. 1001.

[34] Act March 4, 1915, c. 153, § 9, 38 Stat. 1167 (U. S. Comp. St. § 8391); Ex parte Larsen (D. C.) 233 Fed. 708.

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consuls. In cases where such a treaty exists, the court will not interfere at all.[85]

In cases where there is no treaty expressly forbidding it, the courts have discretion whether to take jurisdiction or not, but they will not take jurisdiction unless under extreme circumstances of cruelty or hardship.[86]

In considering this question, the sailors are presumed to be of the same nationality as the ship, no matter what their actual nationality.[87]

When the court takes jurisdiction under such circumstances, it applies by comity the law of the vessel's flag.[88]

MASTER'S RIGHT TO PROCEED IN REM FOR HIS WAGES

11. Under the general admiralty law, the master has no right to proceed in rem for wages. Whether he has when a state statute purports to give it is unsettled.

The master is not allowed, under the general admiralty law, to proceed against the vessel either for his wages or any disbursements that he may make on her behalf.

One reason assigned for this exception is that the master does not need such a remedy, as he may pay himself out of the freight money. But the difficulty about this is that he does not always have the right to collect it, and, in fact, under modern conditions, very rarely has that right.

A better reason is his relation to the ship. He is the trustee or representative of the owners in distant ports.

[85] Montapedia (D. C.) 14 Fed. 427; Albergen (D. C.) 223 Fed. 443.

[86] BELGENLAND, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Albani (D. C.) 169 Fed. 220.

[87] In re Ross, 140 U. S. 454, 11 Sup. Ct. 897, 35 L. Ed. 581; Ester (D. C.) 190 Fed. 216.

[88] Belvidere (D. C.) 90 Fed. 106; Hannington Court (D. C.) 252 Fed. 211.

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The law looks to him to protect their interests, and they have the right to assume that he will protect their interests. When a ship herself is sued, process is served upon her alone, or her master, and not upon her owners. In such case the master is their representative for the very purpose of protecting the ship and safeguarding their interests. Hence, if he were allowed to sue his own vessel, he might confiscate her at the very time when they think he is protecting her, and so he has no right to proceed against the ship which is intrusted to him to protect.[39]

It is a more difficult question whether a state statute can give a master a right of action against the ship. In the Raleigh Case, just cited, Judge Hughes held that it could not. The principle as to the effect of state statutes is that, if a contract is maritime in its nature, a state statute can add to it the additional remedy of a lien, and the federal courts will enforce it. Hence, if the claim of the master is maritime under the principles of general admiralty law, it would seem that a state statute could add to the right which he would then have to sue in personam the additional right of proceeding against the vessel in rem. There was some wavering on the question whether he can proceed even in personam.[40] But it is now settled that the contract is maritime, which would give him the right to proceed in personam.

In the Mary Gratwick,[41] where a statute of California purported to give the master a lien, Judge Hoffman held that his contract was maritime, and that, therefore, the statute could give the right of procedure in rem.

The fact that the contract is maritime is settled by the

§ 11. [39] Raleigh, 2 Hughes, 44, Fed. Cas. No. 11,539; Grand Turk, 1 Paine, 73, Fed. Cas. No. 5,683.

[40] Grand Turk, 1 Paine, 73, Fed. Cas. No. 5,683; Hammond v. Essex Fire & Marine Ins. Co., 4 Mason, 196, Fed. Cas. No. 6,001.

[41] Fed. Cas. No. 17,591.

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William M. Hoag.[42] There a master had proceeded against a vessel under a statute of Oregon purporting to give him the lien. District Judge Bellinger had held that he was entitled to hold the vessel.[43] Thereupon an appeal was taken direct to the Supreme Court under the clause of the appellate court act giving such appeal on questions of jurisdiction. It was contended that whether the master had a lien for his wages was a question of jurisdiction. The case was heard along with that of the Resolute.[44] Mr. Justice Brown therefore found it necessary to discuss exactly what constitutes jurisdiction. He held that: "Jurisdiction is the power to adjudicate a cause upon the merits, and dispose of it as justice may require. As applied to a suit in rem for a breach of a maritime contract, it presupposes —First, that the contract sued upon is a maritime contract; and, second, that the property proceeded against is within the lawful custody of the court. These are the only requirements to give jurisdiction. Proper cognizance of the parties and subject-matter being conceded, all other matters belong to the merits." The opinion of the Supreme Court, therefore, settles that the contract is maritime, which required an affirmance of the decree of the District Court without passing upon the question whether the state statute could create the additional lien.

Under the principles laid down in the J. E. RUMBELL,[45] it seems that state statutes could have this effect, though in that case the question whether it could have such an effect as to a claim of the master for wages was expressly reserved. in fact, these two cases show that the Supreme Court is reluctant to sustain such a lien, on account of the inconvenience and abuses to which it may give rise.

[42] 168 U. S. 443, 18 Sup. Ct. 114, 42 L. Ed. 537. See, also, Union Fish Co. v. Erickson, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261.
[43] (D. C.) 69 Fed. 742.
[44] 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533.
[45] 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

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The English statutes give the master such a lien, both for wages and disbursements.[46]

PILOTAGE

12. A pilot is a person who, in consequence of his special knowledge of the waters, has charge of the handling of a vessel.

13. State pilot laws are constitutional.

14. The skill required of a pilot is the ordinary care of an expert in his profession.

15. When in charge of navigation, he supersedes the master.

16. Under the American decisions the vessel is liable for his negligence, though he is a compulsory pilot.

17. He is liable for negligence.

18. The ordinary forms of pilot associations are not liable for the acts of one of their members.

19. In America admiralty courts have jurisdiction of suits against pilots.

The word "pilot" is used in admiralty in reference to two classes. He may be a regular member of the crew, or he may be taken aboard simply to conduct a vessel in or out of port. The nature of his duties is in each case about the same. He is supposed to know specially the waters through which the vessel navigates, and to conduct her safely through them. The importance of his duties, therefore, is only second to that of the master. In fact, the courts have frequently looked upon him as practically charged with the same responsibility as the master.

[46] Morgan v. Castlegate S. S. Co., [1893] A. C. 38; Rupert City (D. C.) 213 Fed. 263.

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Validity of State Pilot Laws

Most of the states bordering on navigable waters have passed laws regulating the business of pilotage, and rendering it obligatory upon a vessel to take a pilot, or pay the pilotage fees, though the master of the vessel may himself be familiar with the waters, and not need assistance in taking his ship to port. The compulsory nature of these laws has been often criticized, but they are based upon reasons of sound public policy. Unless pilotage is compulsory, the occupation would not be sufficiently remunerative to induce men of skill and character to engage in it. It is like other numerous kinds of expenses in modern business where people must pay when no direct service is rendered, in order to support a class of men who can render that service best. It is similar to the payment of taxes in order to support police and fire departments, though the individuals who pay them may never be robbed or have their houses burned; for a moment may come when any one of them may need such protection.

In COOLEY v. BOARD OF WARDENS OF PORT OF PHILADELPHIA[47] the court says: "Like other laws, they are framed to meet the most usual cases—quæ frequentius accidunt. They rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor, and expense, and danger to place themselves in a position to render important service generally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases in

§§ 12–19. [47] 12 How. 299, 13 L. Ed. 996.

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which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer of pilotage service one of those cases; and we cannot pronounce a law which does this to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage as to be deemed for this cause a covert attempt to legislate upon another subject under the appearance of legislating on this one."

In the China [48] the court said: "It is necessary that both outward and inward bound vessels of the classes designated in the statute should have pilots possessing full knowledge of the pilot grounds over which they are to be conducted. The statute seeks to supply this want, and to prevent, as far as possible, the evils likely to follow from ignorance or mistake as to the qualifications of those to be employed, by providing a body of trained and skillful seamen, at all times ready for the service, holding out to them sufficient inducements to prepare themselves for the discharge of their duties, and to pursue a business attended with so much of peril and hardship."

These pilotage laws are among the state statutes relating to vessels which have been upheld as not in conflict with the clause of the federal constitution conferring on congress the exclusive right to regulate interstate and foreign commerce.[49] The theory of these decisions is that such laws affect commerce incidentally, and are valid until congress legislates on the subject.

The leading case on the subject is COOLEY v. BOARD OF WARDENS OF PORT OF PHILADELPHIA.[50]

[48] 7 Wall. 53, 19 L. Ed. 67.

[49] Article 1, § 8, cl. 3.

[50] 12 How. 299, 13 L. Ed. 996. See, also, Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. 52, 49 L. Ed. 224; Thompson v. Darden, 198 U. S. 310, 25 Sup. Ct. 660, 49 L. Ed. 1064.

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Skill Required of Pilot

Since a pilot hires himself out as an expert, and is employed because he is an expert, the measure of care required of him is a high one. Some of the cases go so far as to say that his liability is as great as that of a common carrier, but the contract of pilotage is, after all, one of mere hiring, and the duty required of him is simply the ordinary care required of any servant. This ordinary care, however, varies with the character of the employment, so that the ordinary care required of an expert is much higher than the ordinary care required of a simple driver of a land vehicle. The pilot's liability is for ordinary care, but that means the ordinary care of an expert in his profession. While he is not liable for mere errors of judgment, he is liable for any accident that care and attention and an intelligent knowledge of the locality with which he professes familiarity might prevent. He is supposed to know the currents, the channel, and all special difficulties connected therewith, except unknown and sudden obstructions which he could not find out by intelligent attention. He is supposed to know how to cross the bar, and when it is the proper time to cross it.[51]

In ATLEE v. NORTHWESTERN UNION PACKET CO.[52] the court lays down the following as the knowledge required of a river pilot:

"The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge

[51] Guy v. Donald, 157 Fed. 527, 85 C. C. A. 291, 14 L. R. A. (N. S.) 1114, 13 Ann. Cas. 947; Dora Allison (D. C.) 213 Fed. 645.

[52] 21 Wall. 389, 22 L. Ed. 619; Harrison v. Hughes, 125 Fed. 860, 60 C. C. A. 442.

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and skill, guided as he is in his course by the compass, by the reckoning and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality, and is made aware of the dangers of such locality, if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs, or snags, or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity—his skilled knowledge—very seriously in the course of a long voyage. He should make a few of the first 'trips' as they are called, after his return, in company with other pilots more recently familiar with the river.

"It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control—for in this they are absolute masters—the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal licenses this very class of skill, we do not think we fix the standard very high."

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In the Oceanic [53] the court says: "A licensed pilot, who undertakes to take a ship, with sails up, through a channel such as that leading over the bar of the St. Johns river, Fla., should know the channel, its depths, shoals, and the changes thereof, and should be charged with negligence if he fails to skillfully direct the course of the ship, and give proper supervision and direction to the navigation of the tug which is towing her."

Relative Duties of Pilot and Master

When a pilot comes aboard, it is often a difficult question to say what are his duties and those of the master in connection with the navigation. No ship is large enough for two captains. It may be said, in general, that the pilot has charge of the navigation, including the course to steer, the time, place, and method of anchorage, and, in general, the handling of the ship. The master must not interfere unless the pilot is plainly reckless or incompetent. Then he must take charge himself. In fact, in many cases the pilot is spoken of as the temporary master. On their relative duties the Supreme Court says: [54] "Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, is the temporary master, charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged." [55]

The master however may and should call the attention of

[53] 20 C. C. A. 574, 74 Fed. 642. See, also, Saluda, Fed. Cas. No. 17,232; SIDERACUDI v. MAPES (D. C.) 3 Fed. 873; Compagnie de Navigation Francaise v. Burley (D. C.) 183 Fed. 166; Burley v. Compagnie de Navigation Francaise, 194 Fed, 335, 115 C. C. A. 199.

[54] COOLEY v. BOARD OF WARDENS OF PORT OF PHILADELPHIA, 12 How. 316, 13 L. Ed. 1003.

[55] See, also, Oregon, 158 U. S. 194, 195, 15 Sup. Ct. 804, 39 L. Ed. 943; MARCELLUS, 1 Cliff. 481, Fed. Cas. No. 2,347.

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§the pilot to dangers which seem to have escaped the latter's attention.[56]

Liability of Vessel for Acts of Pilot

In one respect the decisions in relation to pilots run counter to common-law ideas on the subject of agency. It is a principle of the law of agency that the foundation of the master's responsibility for the acts of his agent is the right of selection and control. Yet the American courts hold that a vessel is responsible to third parties for injuries arising from the negligence of the pilot, though he came on board against the will of the master, under a state statute of compulsory pilotage.[57]

The English law was long different. But by Pilotage Act 1913, § 15, the ship is made liable, though in charge of a compulsory pilot.*

A pilot law is not considered compulsory, if the only penalty imposed is the payment of the pilotage fee.[58]

The reason why the vessel is held liable is that admiralty looks on the vessel itself as a responsible thing, and that under the ancient laws relating to pilots the responsibility was one which attached to the vessel itself, irrespective of ownership, it being thought unjust to require injured third parties to look beyond the offending thing to questions of ownership or control.[59]

The rationale of the doctrine excludes the idea of any

[56] Homer Ramsdell Transp. Co. v. Compagnie Générale Transatlantique (C. C.) 63 Fed. 845; Tactician [1907] P. 244.

[57] China, 7 Wall. 53, 19 L. Ed. 67; Indra Line v. Palmetto Phosphate Co., 239 Fed. 94, 152 C. C. A. 144.

*Marsden, Coll. (7th Ed.) p. 237; Carver, Carriage by Sea (6th Ed.) p. 43, § 30a.

[58] Merrimac, 14 Wall. 199, 20 L. Ed. 873; Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155. See, also, Dallington, [1903] P. 77.

[59] Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264.

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personal liability of the owners for the act of a compulsory pilot.[60]

A pilot is liable to the vessel for any damage caused by carelessness or negligence.[61]

Liability of Association for Acts of Individual Pilot

Where state pilot laws prevail, it is usual for the pilots to organize into associations, frequently unincorporated. The question whether the association would be liable for the negligence of one of its members is a nice one. It would depend upon the character of the association. Some of them own no common property, keep no common fund, and the pilots take vessels in rotation, and each pilot takes the fee which he makes. Other associations own pilot boats in common, rent officers, own other property, keep a common fund, pay all expenses, pay all the separate fees collected from vessels into the common fund, and divide the balance remaining among the individual members. On principle it would seem that this ought to constitute a joint liability, and that the different members of such an association ought to be responsible for the acts of an individual pilot. It would seem that all the requisites that concur to make a joint liability would be present in such a case. In fact, it would hardly be putting the case too strongly to call it a partnership, provided the individuals composing the association have the right to decide who shall be members of the association.

In Mason v. Ervine,[62] Judge Pardee, as circuit judge, held that the Louisiana Pilots' Association was not liable for the act of one of its members. This case rather turned

[60] Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155; Hathor (D. C.) 167 Fed. 194.

[61] SIDERACUDI v. MAPES (D. C.) 3 Fed. 873; Guy v. Donald, 157 Fed. 527, 85 C. C. A. 291, 14 L. R. A. (N. S.) 1114, 13 Ann. Cas. 947.

[62] (C. C.) 27 Fed. 459.

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upon the special language of the Louisiana Code, for the report itself does not show the provisions or character of their association. In any event, the question was not necessary for the decision of the case, as he held that the pilot himself was not guilty of any negligence, which of itself was sufficient to dispose of the case.

In the City of Reading,[63] District Judge McPherson held that the Delaware River Pilots' Association was not responsible for the negligence of one of its members. The report does not fully show the character of that association, but it would seem to be a mere association for benevolent purposes, and that even the pilot fees were not paid into a common treasury. In Guy v. Donald [64] the Supreme Court decided that the Virginia Pilot Association is not such a partnership or joint adventure as rendered its individual members liable for each other. The controlling consideration was the construction placed upon the Virginia pilot laws to the effect that such laws did not give the members the delectus personæ, nor the right of discharge or control.

If such right exists, no reason is perceived why pilots cannot form a partnership or joint adventure, with its usual advantages and liabilities, as well as any one else.[65]

Remedies for Pilotage

A pilot may proceed in rem against the vessel for his fees, though they are merely for a tender of service which the vessel refuses to accept.[66]

[63] (D. C.) 103 Fed. 696, affirmed City of Dundee, 108 Fed. 679, 47 C. C. A. 581, as to nonliability of association, reserving question as to liability of ship for act of pilot. See, also, Manchioneal, 243 Fed. 801, 156 C. C. A. 313.

[64] 203 U. S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245.

[65] Jones v. Fell, 5 Fla. 510; Joseph Vaccaro (D. C.) 180 Fed. 272 (discussing the Guy v. Donald decision, 203 U. S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245).

[66] Alzena (D. C.) 14 Fed. 174; Queen, 206 Fed. 148, 124 C. C. A. 214.

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It seems clear on principle that admiralty has jurisdiction of suits against pilots for negligence. The English decisions, however, are against it.[67] But their decisions turn upon their special statutes, and upon doctrines not adopted by our courts. There are many such cases in our reports, though the question of jurisdiction was not raised in some of them.[68]

On principle the jurisdiction is clear. It would be difficult to find a transaction more maritime in character than the duties of a pilot. His right to proceed in rem is settled, and the right to proceed against him ought to be as maritime as his right to seize the vessel.

As will be seen in a future connection, the test of a maritime tort is that it is a tort occurring on maritime waters. The act of a pilot in injuring a vessel by his negligence measures up to this test. Therefore there ought to be no question of the right to proceed against him in the admiralty.

[67] Urania, 10 Wkly. Rep. 97; 1 Mar. Law Cas. (O. S.) 156; Alexandria, L. R. 3 A. & E. 574; Flower v. Bradley, 44 L. J. Ex. 1; Queen v. Judge, [1892] 1 Q. B. 273.

[68] See, as illustrations, SIDERACUDI v. MAPES (D. C.) 3 Fed. 873; WILSON v. PILOTS' ASS'N (D. C.) 55 Fed. 1000; Wilson v. Charleston Pilots' Ass'n (D. C.) 57 Fed. 227; Strathleven S. S. Co. v. Baulch, 244 Fed. 412, 157 C. C. A. 38.

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CHAPTER III

OF GENERAL AVERAGE AND MARINE INSURANCE.

20. "General Average" Defined.
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34. All Other Perils.
35. Proximate Cause of Loss.
36. The Loss—Total or Partial.
37. Actual or Constructive.
38. Abandonment.
39. Agreed Valuation.
40. Subrogation of Insurer.
41. Suing and Laboring Clause.

"GENERAL AVERAGE" DEFINED

20. General average contribution is a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the

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parties for the general benefit of all the interests embarked in the enterprise.[1]

Antiquity and Nature

This is one of the earliest known subjects of maritime law. It can be traced back through the Roman law to the Rhodian law, which prevailed before Lycurgus laid the foundations of Spartan, or Solon of Athenian, greatness.

"Lege Rhodia cavetur ut si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est."

If, in a storm, the ship must be lightened in order to save her and her contents, and a part of the cargo is thrown overboard for the purpose, the ship, her freight money, and the remaining cargo must contribute to indemnify the owner of the goods sacrificed; in other words, the ship and cargo are looked upon as a single maritime venture, and the loss is averaged on all. This instance of general average by the throwing of goods overboard, or by throwing over parts of the ship for the same purpose, like anchors, boats, masts, etc., is called "jettison." [2] But there are many other forms. Suppose, for example, a master, for the common safety of all interests, voluntarily strands his vessel. The salvage for getting her off would be a subject of general average, as also her value, in case she was not saved, but the cargo was saved.[3]

The principle applies as among underwriters on a vessel not intended for cargo, as a tug, or a vessel in ballast.[4] Al-

[1] Quoted from the STAR OF HOPE, 9 Wall. 203, 19 L. Ed. 638. See, also, the definition in the Jason, 225 U. S. 32, 32 Sup. Ct. 562, 56 L. Ed. 969.

§ 20. [2] Montgomery v. Insurance Co., [1901] P. D. 147; May v. Keystone Yellow Pine Co. (D. C.) 117 Fed. 287.

[3] Columbian Ins. Co. v. Ashby, 13 Pet. 331, 10 L. Ed. 186.

[4] So decided as to a tug by Judge Addison Brown of New York, acting as arbitrator in the matter of the Hercules, February 11, 1903. As to vessels in ballast or without cargo, see Greely v. Tremont

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so among underwriters on different interests, where there is a common ownership of vessel and cargo.[5]

Stranding

Some of the closest questions in general average arise when the issue is whether the stranding is voluntary, which would be a case of general average, or involuntary, which would be a peril of the sea, to be borne by the party who suffers from it. A notable case on this subject is Barnard v. Adams,[6] where a ship that had broken from her moorings in a storm was stranded intentionally by the master in such a way that the cargo could be saved. The grounding was inevitable, but the master chose the best place that he could reach, instead of letting her drift.

In the STAR OF HOPE,[7] fire was discovered upon a vessel, in consequence of which she made sail for the Bay of San Antonio, which was the easiest port to reach. On arrival there she waited some time for a pilot to guide her into the bay, but none came, and, the fire increasing, and destruction being inevitable if he remained outside, the master endeavored to take her in himself, having in his mind the risk of grounding in the attempt. In doing so she struck upon a reef accidentally. The court held that it was a case for general average, though he did not run her upon that special reef intentionally, as he purposely took the chance of grounding in making harbor, and by his act a large portion of the common venture was saved.

On the other hand, in the Major William H. Tantum,[8] where the vessel grounded without the master's intending to do so, and in no better place than if he had not slipped

Ins. Co., 9 Cush. (Mass.) 415; Potter v. Ocean Ins. Co., 3 Sumn. 27, Fed. Cas. No. 11,335; Steamship Carrisbrook Co. v. London, [1902] 2 K. B. 681.

[5] Montgomery v. Indemnity Mutual Ins. Co., [1902] 1 K. B. 734.

[6] 10 How. 270, 13 L. Ed. 417; Norwich & N. Y. Transp. Co. v. Insurance Co. of North America (D. C.) 118 Fed. 307; Id., 129 Fed. 1006, 64 C. C. A. 610.

[7] 9 Wall. 203, 19 L. Ed. 638.

[8] 1 C. C. A. 236, 49 Fed. 252.

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her cable, and with no benefit in the final result, it was held that general average could not be enforced.

REQUISITES OF GENERAL AVERAGE

21. To give the right to a general average contribution, the sacrifice

(a) Must be voluntary, and for the benefit of all.

(b) Must be made by the master, or by his authority.

(c) Must not be caused by any fault of the party asking the contribution.

(d) Must be successful.

(e) Must be necessary.

The Sacrifice must be Voluntary, and for the Benefit of All

If a mast is carried away by a storm, that is a peril of the sea—one of the risks which the ship carries, and which she cannot ask any other interest to aid her in bearing. If, in consequence of a storm, and without negligence on the part of the ship or her crew, water reaches the cargo, and injures it, that must be borne by that part of the cargo alone which is injured. There is nothing voluntary about either of these cases. If a ship springs a leak at sea, and puts into port, and has to unload and afterwards reship the cargo, the expenses of repairing the leak must be borne by the ship, and cannot be charged as average. Such a charge would be for the benefit of the ship alone, not for the benefit of all. In such case the expense of handling the cargo would not come into the average under the English decisions, but would under the American.[9]

Temporary repairs, of no lasting value to the shipowner, and enabling the vessel to complete her voyage, are a proper subject of general average.[10]

[9] STAR OF HOPE, 9 Wall. 203, 19 L. Ed. 638; Hobson v. Lord, 92 U. S. 397, 23 L. Ed. 613; Svensen v. Wallace, 10 A. C. 404.

[10] Shoe v. Craig (D. C.) 189 Fed. 227; Shoe v. George F. Craig & Co., 194 Fed. 678, 115 C. C. A. 72; Congdon on General Average, 119.

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On the same principle, flooding the compartments of a vessel, with the result of diminishing the damage to the cargo, may be the subject of general average.[11]

In Anglo-Argentine Live Stock & Produce Agency v. Temperley Shipping Co.,[12] there was a deck cargo of live stock to be carried from Buenos Ayres to Deptford under a contract which required that the ship should not call at any Brazilian port before landing her live stock, the reason being that, if she did, the cattle could not be landed in the United Kingdom. After sailing, the ship sprang a leak, and the master, for the safety of all concerned, put back to Bahia. Consequently the cattle could not be landed in England, and had to be sold elsewhere at a loss. It was held that this loss was a proper subject of general average.

In Iredale v. China Traders' Ins. Co.,[13] a cargo of coal on a voyage from Cardiff to Esquimault became heated, so that the master had to put into a port of refuge, and land the coal. On landing a survey was held upon it, and it was found incapable of being reloaded, and hence was sold. Thereupon the voyage was abandoned, and the freight was lost. The freight underwriters claimed that under these circumstances freight should be the subject of general average, but the court held otherwise, as the coal had really become worthless, not from any act of the master in going into port, but from internal causes, and therefore it was not a voluntary sacrifice.

It must be Made by the Master, or by his Authority

The powers of the captain are necessarily extended. His owners may be scattered, or inaccessible. He may not know who are the owners of the cargo. His voyage may

[11] Wordsworth (D. C.) 88 Fed. 313.

[12] [1899] 2 Q. B. 403.

[13] [1899] 2 Q. B. 356; Id., [1900] 2 Q. B. 515. See, also, Greenshields v. Stephens, [1908] A. C. 431 (allowed for damage caused by water to other cargo; water having been used by master's consent in extinguishing the fire).

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extend around the globe, where communication is impossible. Hence he has, ex necessitate rei, powers unknown to any other agent. He can bind the ship and owners for necessary funds to complete the voyage. He can often sell part of the cargo to raise funds for the same purpose. He can give bottomry or respondentia bonds with the same object. He must communicate with the parties interested, if reasonably practicable,[14] but there is a strong presumption in favor of a discretion honestly exercised by him.[15]

But he alone has such powers, and his right to incur a general average charge is limited to his own ship and her own cargo.

In the J. P. Donaldson,[16] the master of a tug, which had a tow of barges, voluntarily cast them off in a storm to save his tug. The owners of the barges libeled the tug for an average contribution, the tug having been saved, and the barges lost. The court held that it was not a case for general average, as the barges did not occupy the relation to the tug which the cargo occupies to a ship, and the master of the tug did not hold to them the relation which the master of a ship holds to her cargo.

In RALLI v. TROOP,[17] a ship which had caught on fire was scuttled by the municipal authorities of the port, and became a total loss; but it resulted in saving the cargo. The court held that the loss of the ship could not be charged against the cargo in general average, for the reason that it was the act of strangers, and not of the master. The learned opinion of Mr. Justice Gray may be specially rec-

[14] Julia Blake, 107 U. S. 418, 2 Sup. Ct. 692, 27 L. Ed. 595; Shoe v. Craig (D. C.) 189 Fed. 227; Shoe v. George F. Craig & Co., 194 Fed. 679, 115 C. C. A. 72.

[15] Willcox Peck & Hughes v. American Smelting & Refining Co. (D. C.) 210 Fed. 89.

[16] 167 U. S. 599, 17 Sup. Ct. 951, 42 L. Ed. 292.

[17] 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742. See, also, Minneapolis, St. P. & S. S. S. Co. v. Manistee Transit Co. (D. C.) 156 Fed. 424.

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ommended as an epitome of our law on the subject. He summarizes his conclusions thus:

"'The law of general average is part of the maritime law, and not of the municipal law, and applies to maritime adventures only.

"'To constitute a general average loss, there must be a voluntary sacrifice of part of a maritime venture, for the purpose, and with the effect, of saving the other parts of the adventure from an imminent peril impending over the whole.

"'The interests so saved must be the sole object of the sacrifice, and those interests only can be required to contribute to the loss. The safety of property not included in the common adventure can neither be an object of the sacrifice nor a ground of contribution.

"As the sacrifice must be for the benefit of the common adventure, and of that adventure only, so it must be made by some one specially charged with the control and the safety of that adventure, and not be caused by the compulsory act of others, whether private persons or public authorities.

"The sacrifice, therefore, whether of ship or cargo, must be by the will or act of its owner, or of the master of the ship, or other person charged with the control and protection of the common adventure, and representing and acting for all the interests included in that adventure, and those interests only.

"A sacrifice of vessel or cargo by the act of a stranger to the adventure, although authorized by the municipal law to make the sacrifice for the protection of its own interests, or of those of the public, gives no right of contribution, either for or against those outside interests, or even as between the parties to the common adventure.

"The port authorities are strangers to the maritime adventure, and to all the interests included therein. They are in no sense the agents or representatives of the parties

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to that adventure, either by reason of any implied contract between those parties, or of any power conferred by law over the adventure as such.

"They have no special authority or special duty in regard to the preservation or the destruction of any vessel and her cargo, as distinct from the general authority and the general duty appertaining to them as guardians of the port, and of all the property, on land or water, within their jurisdiction.

"Their right and duty to preserve or destroy property, as necessity may demand, to prevent the spreading of a fire, is derived from the municipal law, and not from the law of the sea.

"Their sole office and paramount duty, and, it must be presumed, their motive and purpose, in destroying ship or cargo in order to put out a fire, are not to save the rest of a single maritime adventure, or to benefit private individuals engaged in that adventure, but to protect and preserve all the shipping and property in the port for the benefit of the public.

"In the execution of this office, and in the performance of this duty, they act under their official responsibility to the public, and are not subject to be controlled by the owners of the adventure, or by the master of the vessel as their representative.

"In fine, the destruction of the J. W. Parker by the act of the municipal authorities of the port of Calcutta was not a voluntary sacrifice of part of a maritime adventure for the safety of the rest of that adventure, made, according to the maritime law, by the owners of vessel or cargo, or by the master as the agent and representative of both. But it was a compulsory sacrifice, made by the paramount authority of public officers deriving their powers from the municipal law, and the municipal law only; and therefore neither gave any right of action, or of contribution, against the owners of property benefited by the sacrifice, but not

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included in the maritime adventure, nor yet any right of contribution as between the owners of the different interests included in that adventure."

But, if the scuttling was done at the request of the master, the loss would be the subject of general average.[18]

It Must Not be Caused by Any Fault [19]

For instance, it is implied in all contracts of shipment that the vessel shall be seaworthy.[20] If a voluntary sacrifice is rendered necessary by a breach of this warranty, the vessel so far from being entitled to recover in general average, can be held liable for any injury to the cargo caused thereby.[21]

Under the Harter Act, if she has exercised due diligence to make herself seaworthy, she is no longer liable to the cargo for negligent navigation, but in the absence of special agreement she cannot claim contribution in general average for an injury so occasioned. But since the passage of that statute she can claim such contribution if the right to the same is the subject of special stipulation.[22]

A shipper, however, is not considered in fault, and thereby deprived of the right to contribution, when the peril is caused by a concealed defect in his shipment equally unknown to him and the shipowner.[23]

Cargo carried on deck, of a character not customarily

[18] Roanoke, 8 C. C. A. 67, 59 Fed. 161.

[19] Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130; Tarabochia v. American Sugar Refining Co. (D. C.) 135 Fed. 424.

[20] Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

[21] Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130; Pacific Mail S. S. Co. v. N. Y. H. & R. Min. Co., 20 C. C. A. 349, 74 Fed. 564; Snow v. Perkins (D. C.) 39 Fed. 334.

[22] Post, c. 8, p. 186; Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969; Ralli v. Societa Anonima de Navigazione (D. C.) 222 Fed. 994.

[23] Wm. J. Quillan, 180 Fed. 681, 103 C. C. A. 647; Greenshields v. Stephens, [1908] A. C. 431.

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carried there, cannot claim the benefit of a general average as against those not agreeing thereto.[24]

It Must be Successful

The foundation of the claim is that it is for the benefit of all. If they are not benefited thereby, there is no equitable claim upon them.[25]

It Must be Necessary

This almost goes without saying. The master is vested with a large discretion as to its necessity, and the courts are inclined to uphold that discretion.[26]

Practice

In practice, when a master has had a disaster, he comes into port for the purpose of repairs, and employs an average adjuster to make up a statement, pick out such items as are properly chargeable in general average, and apportion them among the several interests. The master is entitled to hold the cargo until this is done, or until its owners give average bonds conditioned to pay their respective proportions. If he does not do so, his owners are liable to the parties injured.[27]

Remedies to Enforce Contribution

At first there was some question whether admiralty had jurisdiction over suits to compel the payment of such proportion. But it is now settled that the master has a lien upon the cargo to enforce their payment, that such lien may be asserted in an admiralty court, and that suits on average bonds are also sustainable in admiralty.[28]

[24] Hettie Ellis (C. C.) 20 Fed. 507; John H. Cannon (D. C.) 51 Fed. 46; Wood v. Phœnix Ins. Co. (D. C.) 1 Fed. 235; Id. (C. C.) 8 Fed. 27.

[25] Congdon on General Average, 11.

[26] Lawrence v. Minturn, 17 How. 100, 15 L. Ed. 58. This means that there must be, in the language of Ralli v. Troop, supra, "an imminent peril impending over the whole."

[27] Santa Ana, 154 Fed. 800, 84 C. C. A. 312.

[28] Dupont de Nemours v. Vance, 19 How. 162, 15 L. Ed. 584;

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"MARINE INSURANCE" DEFINED.

22. Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo, freight, or other insurable interest in such property may be exposed during a certain voyage or a fixed period of time.

23. MARITIME CHARACTER OF CONTRACTS—Such contracts are cognizable in the admiralty, but are not so connected with the ship as to give a proceeding against the ship herself for unpaid premiums.

Marine insurance is of great antiquity, and is recognized as within the jurisdiction of the admiralty courts by the leading continental courts and authorities. In America it was so held by Mr. Justice Story in the great case of DE LOVIO v. BOIT,[29] and was definitely settled by the decision of the Supreme Court in New England Mut. Ins. Co. v. Dunham.[30] But, while such contracts are maritime, the distinction heretofore drawn still prevails, as preliminary contracts for insurance, or suits to reform a policy not in accordance with the preliminary contract, are not maritime.[31]

San Fernando (C. C.) 12 Fed. 341. On this general subject. See, also, 1 Pars. Shipp. & Adm. 338–478; Coast Wrecking Co. v. Phœnix Ins. Co. (C. C.) 13 Fed. 127; Ralli v. Societa Anonima de Navigazione (D. C.) 222 Fed. 994.

§§ 22–23. [29] Fed. Cas. No. 3,776.

[30] 11 Wall. 1, 20 L. Ed. 90. In England the admiralty courts have no jurisdiction in such cases. Queen v. Judge (1892) 1 Q. B. 273, 293. The English act to codify the law relating to marine insurance, known as the Marine Insurance Act, 1906, so far from restoring such jurisdiction, provides that "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this act, shall continue to apply to contracts of marine insurance."

[31] Andrews v. Essex Fire & Marine Ins. Co., 3 Mason, 6, Fed. Cas. No. 374; Reliance Lumber Co. v. Rothschild (D. C.) 127 Fed. 745.

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Though insurance contracts are maritime, a claim for unpaid premiums can only be asserted against the party taking out the insurance, and cannot be made the basis of a proceeding in rem against the vessel insured.[32]

The reason of this is that insurance is for the benefit of the owner alone. It does not benefit the vessel as a vessel. It does not render her more competent to perform her voyage, or aid her to fulfill the purpose of her creation.[33]

INSURABLE INTEREST

24. Every person has an insurable interest who is interested in a marine adventure.

In particular, a person is interested in a marine adventure, where he stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by the detention thereof, or by damage thereto, or may incur liability in respect thereof.

This definition is taken from the English Marine Insurance Act, 1906. It does not necessarily mean that the insured must have an insurable interest at the time of effecting the policy. He must have it, however, at the time of the loss. For instance, it is frequently the case that vessels whose whereabouts are unknown may be insured "lost or not lost," and this insurance is valid though at the time it is effected it may turn out that the vessel has been totally lost. In HOOPER v. ROBINSON,[34] the court quotes with

[32] Hope (D. C.) 49 Fed. 279; City of Camden, 147 Fed. 847.

[33] Pleroma (D. C.) 175 Fed. 639.

§ 24. [34] 98 U. S. 528, 25 L. Ed. 219. See, also, Woodside v. Canton Ins. Office (D. C.) 84 Fed. 283; Canton Ins. Office v. Woodside, 90 Fed. 301, 33 C. C. A. 63.

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approval a paragraph from Arnould's Insurance, which says that [the insurable interest subsisting during the risk and at the time of loss is sufficient, and the assured need not allege or prove that he was interested at the time of effecting the policy.] The court also says that where the insurance is "lost or not lost" the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract is valid, for it is a stipulation for indemnity against past as well as future losses, and the law upholds it. In the same case the court says: "A right of property in a thing is not always indispensable to the insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy."

In Buck v. Chesapeake Ins. Co.[35] the Supreme Court says that interest does not mean property.

A contract of marine insurance, like other contracts of property insurance, is a contract of indemnity, and hence the party taking out the insurance can only claim indemnity for his actual loss, and cannot make a wager policy. An absolute title or property is not necessary for the validity of such insurance. For instance, in China Mut. Ins. Co. v. Ward,[36] it was held that advances by a ship's husband, accompanied by no lien, but constituting a mere personal debt of the shipowner, were not such an interest as gave him an insurable interest. On the other hand, in the Gulnare,[37] an agent who was operating a vessel on commission, with an actual pledge of the vessel as security, was held to have an insurable interest.

In Merchants' Mut. Ins. Co. v. Baring,[38] it was held that

[35] 1 Pet. 151, 7 L. Ed. 90.

[36] 8 C. C. A. 229, 59 Fed. 712. See, also, Seagrave v. Insurance Co., L. R. 1 C. P. 305.

[37] (C. C.) 42 Fed. 861.

[38] 20 Wall. 159, 22 L. Ed. 250. See, also, Fern Holme (D. C.) 46

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advances of money for the benefit of the ship which had attached to them a lien, marine or equitable, upon the ship for their repayment gave an insurable interest.

A carrier has an insurable interest in goods under its control.[39]

Double Insurance

As it is possible thus to insure not simply the entire property, but different interests in the property, different parties may insure different interests in the same property without its constituting double insurance.

In International Nav. Co. v. Insurance Co. of North America,[40] it was held that a policy on disbursements, which covered many subjects connected with the use of the ship as well as any interest in the ship not covered by insurance (which was against total loss only), was not double insurance with the policy on the ship herself covering partial as well as total loss. The subject-matter of the insurance was different.

In St. Paul Fire & Marine Ins. Co. v. Knickerbocker Steam Towage Co.,[41] a marine policy permitting the tug to navigate certain waters provided that, while she was out of these waters, the policy should be suspended, and should reattach when she returned to such waters. The vessel, intending to go out of these waters, thereupon procured insurance during such deviation. The court held that this was not double insurance, as the two policies necessarily did not overlap.

The issue of the policy raises a presumption that the party insured has an insurable interest.[42]

Fed. 119; Providence Washington Ins. Co. v. Bowring, 50 Fed. 613, 1 C. C. A. 583.

[39] Ursula Bright S. S. Co., Ltd., v. Amsinck (D. C.) 115 Fed. 242; Munich Assur. Co. v. Dodwell, 128 Fed. 410, 63 C. C. A. 152.

[40] (D. C.) 100 Fed. 304; Id., 108 Fed. 987, 48 C. C. A. 181.

[41] 93 Fed. 931, 36 C. C. A. 19.

[42] Nantes v. Thompson, 2 East, 386.

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CONDITIONS IN CONTRACTS OF INSURANCE

25. CONTRACTS OF MARINE INSURANCE ARE SUBJECT TO CERTAIN CONDITIONS, express or implied, a breach of which avoids the contract.

26. MISREPRESENTATION AND CONCEALMENT—Any misrepresentation or concealment of a material fact, or any breach of warranty of any fact, will avoid the policy.

The law on the subject of representations in insurance policies may be said to be generally the same as in any other contract. Any representation of a material fact, or a fact which would influence the judgment of a prudent underwriter, as to taking the risk or assessing the premium, must be substantially true, and every fact of this sort which is within the knowledge of the assured, and not in the knowledge of the underwriter, must be stated. The courts, perhaps, have been a little stricter in reference to marine insurance policies than other contracts, on account of the peculiar nature of the business.

In Hazard v. New England M. Ins. Co.,[48] the vessel was represented as a coppered ship. She was then in the port of New York, and the party applying for the insurance wrote from there to Boston to get it. The expression had different meanings in New York and Boston. The court held that the New York meaning was to be taken. If the representation had not come up to that meaning, the policy would have been void.

In the same case it was held that an underwriter is presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade, and the political conditions of foreign nations; and that, therefore,

§§ 25–26. [48] 8 Pet. 557, 8 L. Ed. 1043.

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such matters of common knowledge as this need not be expressly stated.

In Buck v. Chesapeake Ins. Co.,[44] which was a policy "for whom it might concern," the court held that it was not incumbent upon the party taking out the insurance to state who were interested in it, unless the question was asked, but the questions asked must be answered truthfully.

SUN MUT. INS. CO. v. OCEAN INS. CO.[45] was a case where a company which had insured a vessel on certain voyages reinsured the risk in another company. They failed to state, in the information which they gave the second company, the existence of an important charter, of which they knew, and of which the second company did not know. The policy was held void. The court said: "It thus appears that at the time of the loss Melcher had insurance on two concurrent charters and his primage thereon during one voyage, being insured, besides his interest in the ship, on double the amount of its possible earnings of freight for one voyage. This fact was known to the Ocean Company at the time, and was not communicated by it to the Sun Company, which was without other knowledge upon the subject, and executed its policy to the Ocean Company in ignorance of it.

"That knowledge of the circumstance was material and important to the underwriter, as likely to influence his judgment in accepting the risk, we think is so manifest to common reason as to need no proof of usage or opinion among those engaged in the business. It was a flagrant case of overinsurance upon its face, and made it the pecuniary interest of the master in charge of the ship to forego and neglect the duty which he owed to all interested in her safety. Had it been known, it is reasonable to believe that a prudent underwriter would not have accepted the proposal as made, and, where the fact of the contract is in

[44] 1 Pet. 151, 7 L. Ed. 90.
[45] 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

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dispute, as here, it corroborates the denial of the appellants. The concealment, whether intentional or inadvertent, we have no hesitation in saying, avoids the policy, if actually intended to cover the risk for which the claim is made.

"In respect to the duty of disclosing all material facts, the case of reinsurance does not differ from that of an original insurance. The obligation in both cases is one uberrimæ fidei. The duty of communication, indeed, is independent of the intention and is violated by the fact of concealment, even where there is no design to deceive. The exaction of information in some instances may be greater in a case of reinsurance than as between the parties to an original insurance. In the former, the party seeking to shift the risk he has taken is bound to communicate his knowledge of the character of the original insured, where such information would be likely to influence the judgment of an underwriter; while in the latter the party, in the language of Bronson, J., in the case of New York Bowery Fire Ins. Co. v. Insurance Co., 17 Wend. (N. Y.) 359, 367, is 'not bound, nor could it be expected that he should speak evil of himself.'

"Mr. Duer (2 Ins. 398, Lect. 13, pt. 1, § 13) states as a part of the rule the following proposition:

" 'Sec. 13. The assured will not be allowed to protect himself against the charge of an undue concealment by evidence that he had disclosed to the underwriters, in general terms, the information that he possessed. Where his own information is specific, it must be communicated in the terms in which it was received. General terms may include the truth, but may fail to convey it with its proper force, and in all its extent. Nor will the assured be permitted to urge, as an excuse for his omission to communicate material facts, that they were actually known to the underwriters, unless it appears that their knowledge was as particular and full as his own information. It is the

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duty of the assured to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risks; and, when any circumstance is withheld, however slight and immaterial it may have seemed to himself, that, if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy.' " [46]

If the insurance is placed through a distant agent ignorant of a material fact which is known to the principal, it is the duty of the latter to communicate it to the agent if possible; and his failure to do so would avoid the policy.[47]

In England it is the practice to have a preliminary binder before the issuing of the main policy, and the initialing of this by the parties is treated by them as morally binding, although unenforceable as a contract for want of a stamp.

In Cory v. Patton,[48] after this preliminary contract was made, but before the policy was issued, certain material facts came to the knowledge of the agent of the insured; the fact so coming to his knowledge being the very material one that the ship had been lost. The court held, however, that it was not incumbent upon the insured to communicate this fact, though the preliminary contract was not binding, and the policy had not been issued, because he had given all the material facts up to the time of the preliminary contract, and they would not tempt the un-

[46] See, also, Northwestern S. S. Co. v. Maritime Ins. Co. (C. C.) 161 Fed. 166. Granger v. Providence Washington Ins. Co., 200 Fed. 730, 119 C. C. A. 174. The English Marine Insurance Act, 1906, is an accurate summary of the law as to disclosure and representations. See sections 17–20. See Gow, Mar. Ins. p. 392, and Winter, Mar. Ins. p. 387, for the full text of this act.

[47] McLanahan v. Universal Ins. Co., 1 Pet. 171, 7 L. Ed. 98; Kerr v. Union Marine Ins. Co., 130 Fed. 415, 64 C. C. A. 617.

[48] L. R. 9 Q. B. 577. Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. 664, 21 L. Ed. 246, can hardly be considered in conflict with this.

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derwriter to repudiate an obligation treated as a moral one by those in the business.

A leading case on this general subject is IONIDES v. PENDER.[49] There the assured greatly overvalued the goods without disclosing the real valuation to the underwriter, and it was shown that the question of valuation is, among underwriters, a very material consideration. The court held that this misrepresentation vitiated the policy.

The general doctrine that a warranty, even of an immaterial matter, if broken, avoids the policy, is well settled.[50]

SAME—SEAWORTHINESS

27. It is an implied condition of marine insurance on vessel, cargo, or freight that the vessel shall be seaworthy, which means that she must be sufficiently tight, stanch, and strong to resist the ordinary attacks of wind and sea during the voyage for which she is insured, and that she must be properly manned and equipped for the voyage.

The Marine Insurance Act, 1906, expresses this pithily as follows:

"A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured." [51]

Seaworthiness is, necessarily, a variable term. A vessel which is seaworthy for river navigation may not be for bay navigation, and a vessel which is seaworthy for bay navigation may not be for ocean navigation. Hence the seaworthiness implied means seaworthiness for the voyage insured. It applies not only to the hull of the vessel, but to

[49] L. R. 9 Q. B. 531.

[50] 1 Pars. Ins. 337; Snyder v. Home Ins. Co. (D. C.) 133 Fed. 848; Id., 148 Fed. 1021, 79 C. C. A. 536.

§ 27. [51] Section 39, cl. (4).

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her outfit, including her crew. She must be properly fitted out for the voyage which she is to undertake, and she must have a sufficient and competent crew.

In Pope v. Swiss Lloyd Ins. Co.,[52] it was held that a vessel with insufficient ground tackle to hold her against ordinary incidents of navigation, including ordinarily heavy weather, was not seaworthy.

In RICHELIEU & O. NAV. CO. v. BOSTON MARINE INS. CO.,[53] it was held that a vessel whose compass was defective, though not known to be so, was unseaworthy; for it is implied not merely that the vessel owner will use ordinary care to keep his vessel seaworthy, but that she actually is seaworthy.

In the case of steamers, seaworthiness implies sufficient fuel for the voyage.[54]

In the Niagara[55] (which was a suit by a shipper, not an insurance case, but which applies on this point) the court says: "A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and stanch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number, and sufficient and competent for the voyage, with refer-

[52] (D. C.) 4 Fed. 153.

[53] 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

[54] McIver v. Tate Steamers, Ltd., [1903] 1 K. B. 362; Greenock S. S. Co. v. Maritime Ins. Co., [1903] 1 K. B. 367; [1903] 2 K. B. 657. But fodder for a cargo of cattle is not an appurtenance of the vessel, so as to render her unseaworthy, if not fit for the cattle. Of course such unfitness may be a violation of some special agreement. Tweedie Trading Co. v. Western Assur. Co., 179 Fed. 103, 102 C. C. A. 397.

[55] 21 How. 7, 16 L. Ed. 41. See, also, Whealton Packing Co. v. Ætna Ins. Co., 185 Fed. 108, 107 C. C. A. 113, 34 L. R. A. (N. S.) 563; Forshaw v. Chabut, 3 Br. & B. 158 (7 E. C. L.); Clifford v. Hunter, 3 C. & P. 16 (14 E. C. L.).

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ence to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place, temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his acts and negligence."

In STEEL v. STATE LINE S. S. CO.,[56] Lord Cairns defines seaworthiness as follows:

"I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement—a contract—by the shipowner that the ship on which the wheat is placed is, at the time of its departure, reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy. By 'seaworthy,' my lords, I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic. * * *

"But, my lords, if that is so, it must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle, I think there can be no doubt that this would be the meaning of the contract; but it appears to me that the question is really concluded by authority. It is sufficient to refer to the case of Lyon v. Mells,[57] in the court of

[56] 3 A. C. 72, 76, 77. See, also, Bullard v. Roger Williams Ins. Co., 1 Curt. 148, Fed. Cas. No. 2,122.

[57] 5 East, 428.

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queen's bench during the time of Lord Ellenborough, and to the very strong and extremely well considered expression of the law which fell from the late Lord Wensleydale when he was a judge of the court of exchequer, and was advising your lordship's house in the case of Gibson v. Small." [58]

As a general rule, the burden of proving unseaworthiness is on the underwriter.[59]

But where a vessel which has been exposed to no unusual peril suddenly develops a leak within a short time, this may raise a presumption of unseaworthiness.[60] In reference to this Judge Curtis says:

"But, as I have already indicated, the presumption is that this brig was seaworthy, and the burden of proof is on the underwriters by some sufficient evidence to remove this presumption. This may be done either by proving the existence of defects amounting to unseaworthiness before she sailed, or that she broke down during the voyage, not having encountered any extraordinary action of the winds or waves, or any other peril of the sea sufficient to produce such effect upon a seaworthy vessel, or by showing that an examination during the voyage disclosed such a state of decay and weakness as amounted to unseaworthiness, for which the lapse of time and the occurrences of the voyage would not account. * * *

"There is such a standard, necessarily expressed in general terms, but capable of being applied, by an intelligent jury, to the proofs in the cause. The hull of the vessel

[58] 4 H. L. Cas. 353.

[59] Nome Beach Lighterage & Transp. Co. v. Munich Assur. Co. (C. C.) 123 Fed. 820; Fireman's Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618, 149 C. C. A. 614; Pickup v. Insurance Co., 3 Q. B. D. 594.

[60] Bullard v. Roger Williams Ins. Co., 1 Curt. 148, Fed. Cas. No. 2,122. See, also, Moores v. Underwriters (C. C.) 14 Fed. 226; Batchelder v. Insurance Co. of North America (D. C.) 30 Fed. 459; Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012; Ajum v. Insurance Co., [1901] A. C. 362.

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must be so tight, stanch, and strong as to be competent to resist the ordinary attacks of wind and sea during the voyage for which she is insured."

This warranty of seaworthiness applies at the commencement of the voyage. A vessel may be in port, and require extensive repairs, but, if these repairs are made before she sails, so as to make her seaworthy at sailing, she fulfills what is required of her.[61]

This condition always applies to insurance under voyage policies. As to time policies, there is quite a difference between English and American decisions. Under the American decisions a vessel, when insured by a time policy, must be seaworthy at the commencement of the risk. If, when so seaworthy, she sustains damage, and is not refitted at an intermediate port, and a prudent master would have refitted her there, and she is lost in consequence of the failure to refit her, she would be unseaworthy, and the underwriter would not be liable. If, however, she is not refitted, and is lost from a different cause, the underwriters would be liable, though a prudent master would have had her refitted.[62]

In England, on the other hand, there is no warranty of seaworthiness on time policies, either at the commencement of the voyage or at any other time.[63]

[61] McLanahan v. Universal Ins. Co., 1 Pet. 171, 184, 7 L. Ed. 98; St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co., 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. (N. S.) 1161; Stetson v. Insurance Co. of North America (D. C.) 215 Fed. 186. But such a warranty does not apply to lighters employed to land the cargo. Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co., Ltd. (D. C.) 210 Fed. 958; Thames & Mersey Marine Ins. Co. v. Pacific Creosoting Co., 223 Fed. 561, 139 C. C. A. 101.

[62] Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; Cleveland & B. Transit Co. v. Insurance Co. of North America (D. C.) 115 Fed. 431 (discussing the Inchmaree clause, which is intended to cover latent defects in machinery or hull not due to want of due diligence by owners); Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 39 Sup. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522.

[63] Dudgeon v. Pembroke, 2 A. C. 284. Section 36, cl. 5, of the

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This condition only applies to the vessel. There is no implied condition that the cargo shall be fitted to withstand the voyage for which it is insured.[64]

SAME—DEVIATION

28. It is an implied condition of a voyage policy that the vessel will take the course of sailing fixed by commercial custom between two ports, or, if none is fixed, that it will take the course which a master of ordinary skill would adopt. Any departure from such course, or any unreasonable delay in pursuing the voyage, constitutes what is known as a "deviation."

The reason is that such an act on the part of the vessel substitutes a new risk different from the one which the underwriters have assumed, and, after such deviation commences, the insurers are not liable for any loss incurred during the deviation. The cases on this subject are numerous. Whether an act is a deviation depends largely upon the particular language of the policy and the course of trade.

In HEARNE v. NEW ENGLAND MUT. MARINE INS. CO.,[65] a vessel was insured to a port in Cuba, and at and thence to a port of advice and discharge in Europe. The vessel went to the port in Cuba, and discharged, and then, instead of sailing direct to Europe, sailed for another port in Cuba to reload, and was lost on her way there. The court held that this constituted a deviation, and released

Marine Insurance Act 1906, provides: "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

[64] Koebel v. Saunders, 17 C. B. N. S. (112 E. C. L.) 71; 144 Reprint, 29.

§ 28. [65] 20 Wall. 488, 22 L. Ed. 395.

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the underwriters, and that, in the face of the express language of the contract, it was not admissible to prove a usage in such voyages to go to two ports in Cuba, one for discharge and another for reloading.

In Columbian Ins. Co. v. Catlett,[66] which was the case of a voyage policy from Alexandria to the West Indies and back, it was held that, as the known usage of the trade allowed delay to accomplish the object of the voyage by selling out the cargo, it was not a deviation to remain for that purpose, provided the time so occupied was not unreasonable.

In Wood v. Pleasants,[67] it was held that a stoppage on the way for the purpose of taking on water, and only for that purpose, was not a deviation, assuming that the vessel had a proper supply at the time of sailing.

In West v. Columbian Ins. Co.,[68] a vessel insured on a voyage to Pernambuco unnecessarily anchored off port, when she might have gone directly in. It was held that this delay was such a deviation as discharged the underwriters.

Under the decisions, it is not a deviation for a vessel to delay, or go out of her way, in order to save life at sea, but would be for the purpose of saving property. Under the special facts of special cases this principle is sometimes difficult to apply; for a vessel in deviating to save life can sometimes best accomplish it by saving property, as, for instance, by taking a disabled vessel in tow. But when, after doing so, the facts are such that the lives can be saved without the property, a continued attempt to save the property is a deviation.

[66] 12 Wheat. 383, 6 L. Ed. 664.

[67] Fed. Cas. No. 17,961, 3 Wash. C. C. 201.

[68] Fed. Cas. No. 17,421, 5 Cranch, C. C. 309. See, also, Martin v. Delaware Ins. Co., Fed. Cas. No. 9,161, 2 Wash. C. C. 254.

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A leading case is SCARAMANGA v. STAMP.[69] It was a case arising out of a charter party (in which there is also an implied warranty not to deviate), where a disabled vessel was taken in tow, causing considerable delay to the other vessel. The court held, under the facts, that the delay was unjustifiable.

On the other hand, in Crocker v. Jackson,[70] Judge Sprague held that a departure of the vessel from her course in order to ascertain whether those on board a vessel in apparent distress needed relief, and the delay in order to offer such relief, was not a deviation, though such action for the mere purpose of saving property would be. He held, also, that, if both motives existed, it would not be a deviation, and that, if the circumstances were not decisive, or were ambiguous, as to the motives of the master of the salving vessel, the court would give him the benefit of the doubt.

Distinction between Deviation and Change of Voyage

It is important to bear in mind the distinction between a deviation and an entire change of voyage. As to the former, a mere intention formed to deviate does not avoid the policy until that point is reached where the act of deviating commences. Up to that point the policy is still in force. On the other hand, a change of voyage avoids the policy ab initio, because that substitutes a different risk from the one on which the underwriter has made his calculations.

The test as between the two is that, as long as the termini remain the same, and the master, on leaving, intends to go to the terminus named, and then goes out of his way, or is guilty of an unreasonable delay, it is a deviation; but, if the terminus is changed, then it is a change of voyage.

This is illustrated by Marine Ins. Co. of Alexandria v.

[69] 4 C. P. D. 316; Id., 5 C. P. D. 295.
[70] 1 Spr. 141, Fed. Cas. No. 3,398.

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Tucker.[71] There, a vessel was insured at and from Kingston, Jamaica, to Alexandria. The captain, at Kingston, took on a cargo for Baltimore, intending to go to Baltimore, and then to Alexandria. His ship was captured before reaching the Capes. The court held that this was merely an intended deviation, as the actual deviation would not have commenced until he had gone inside of the Capes to the parting of the ways for the two ports, and that, as no man could be punished for a mere intention, the underwriters were liable. In such case, had he intended to go to Baltimore alone, and not to Alexandria (the terminus named in the policy) at all, it would have been a change of voyage, and his policy would have been void at once.

SAME—ILLEGAL TRAFFIC

29. It is an implied condition that a vessel shall not engage in illegal trade.

This is but another phase of the principle that a contract tainted with illegality is void. Hence any trade which contemplates dealing with an alien enemy, or a violation of the revenue laws of the country whose law governs the policy, renders the contract void.[72]

Care must be taken to remember the difference between the effect of illegal trade known to the parties and its effect when unknown. Even when equally known to both parties, the contract is void, because the court will not lend its aid to enforce such contracts. On the other hand, such a voyage known to one party and unknown to the other is void on a different principle, namely, that the failure of the insured to give the underwriter information of the character of the trade avoids the policy on the ground of misrepresentation or concealment.

[71] 3 Cranch, 357, 2 L. Ed. 466.

§ 29. [72] Jansen v. Mines Co., [1902] A. C. 484.

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An interesting case on this subject is the decision of Mr. Justice Story in ANDREWS v. ESSEX FIRE & MARINE INS. CO.[73] There insurance had been effected on the cargo to proceed to Kingston, Jamaica, and, if not allowed to sell there, then to Cuba. It was known to both parties that the British government forbade American vessels carrying such cargoes there, but both parties thought that the prohibition might be removed by the time the vessel landed. The court held that the knowledge of the underwriters that the trade was illicit did not make them assume that risk, and that it was a risk not covered by the policy.

In Clark v. Protection Ins. Co.,[74] which also was a decision of Mr. Justice Story, when the ship arrived at the port of New Orleans the master took on board a chain cable, which had been bought at his request in Nova Scotia, brought there on another ship, and smuggled on board his vessel. After this she sailed from the port of New Orleans, and was lost. The underwriters contended that this act vitiated the entire insurance. The court held, however, that, as the insurance was originally valid, any subsequent illegality in the voyage did not affect the insurance as to property not tainted with the illegality, although no recovery could be had for the special property which was so tainted.

In Craig v. United States Ins. Co.,[75] an American during the war between the United States and England took out a British license. Mr. Justice Washington held that, as this was an illegal voyage throughout, there could be no remedy upon an insurance policy covering it.

Calbreath v. Gracy[76] involved a somewhat similar ques-

[73] 3 Mason, 6, Fed. Cas. No. 374.

[74] 1 Story, 109, Fed. Cas. No. 2,832. Here the penalty of forfeiture imposed by the revenue law for smuggling was upon the vessel bringing the cable, not upon the vessel receiving it.

[75] Fed. Cas. No. 3,340, Pet. C. C. 410.

[76] 1 Wash. C. C. 219, Fed. Cas. No. 2,296. See, also, Schwartz v.

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tion, though the warranty in that case was express, and not implied. The warranty was of neutrality, the vessel and cargo being warranted as American, but during the voyage she was documented as Spanish, and while so documented was captured by a foreign privateer, and afterwards recaptured by a British privateer. The court held that the warranty that the vessel was American implied a warranty that there should be the necessary documents to show it, and that the act of the insured in having their vessel documented as Spanish defeated their right of recovery.

Violation of Revenue Laws of Another Country

It is a principle of English law that the English courts pay no attention to the revenue laws of another country; and therefore it is not illegal per se to endeavor to smuggle goods into another country. As such an act would increase the risk, failure to tell the underwriter, at the time of effecting the insurance, that it was contemplated, would be a concealment, and avoid the policy on that ground. But, if both the underwriter and insured knew that such action was contemplated, the policy would be valid, although under exactly similar circumstances an attempt to smuggle into England would be an illegal contract, and avoid the policy.

Mr. Parsons, in his work on Marine Insurance,[77] states this as a general principle of insurance law, equally applying to this country, and cites some American decisions to sustain him. One of these is the decision of Mr. Justice Story in Andrews v. Essex Fire & Marine Ins. Co., above referred to; and certainly in that opinion the justice seems to assume that the underwriters would be bound if they knew that illegal trade with a port of a foreign country was

Insurance Co. of North America, 3 Wash. C. C. 117, Fed. Cas. No. 12,504.

[77] 1 Pars. Mar. Ins. p. 84. In Gow, Mar. Ins. (London, 1913) 269, this doctrine is characterized as a "slight obliquity of vision, or a temporary blindness of justice."

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contemplated. The decision cannot be considered as absolutely in point, as the underwriters were held not liable on another ground.

Insurance on vessels or goods engaged in blockade running is not illegal. Such a business is not criminal, or immoral, or against public policy. It only affects the belligerent who has established the blockade. Neutrals may run it if they can, and their only risk is of being caught. A vessel cannot be seized on a subsequent voyage for such an act, which shows that there is nothing immoral about it. Accordingly such insurance is common.[78]

But it is criminal to violate the revenue laws of another country, if made so by those laws; and such violation should be against public policy in any country, and render a contract based upon such act void, even as between the parties.

In Oscanyan v. Winchester Arms Co.,[79] a Turkish consul living in this country made a contract with the Winchester Arms Company by which he was to receive a commission on all the arms of that company which he influenced his government to buy. When he sued for such commissions, the Supreme Court decided that the contract was void as against public policy, and not enforceable. It was urged upon the court that, while such contracts were void under our law, they were quite the proper thing under Turkish law, and that it was a recognized right of Turkish officials to serve their government in that way. The Supreme Court, however, repudiated the argument, and held that it was a question regarding our own citizens, and that, if such transactions might have the effect of demoralizing them, it would not enforce any rights based upon them. This decision, though not exactly in point on the question above discussed, would, at least, indicate a pos-

[78] Maritime Ins. Co., Ltd., v. M. S. Dollar S. S. Co., 177 Fed. 127, 100 C. C. A. 547. Gow, Mar. Ins. 270.

[79] 103 U. S. 261, 26 L. Ed. 539.

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sibility that the Supreme Court would think it just as illegal to defraud a foreign government by smuggling as by giving commissions on arms purchased for it.

THE POLICY AND ITS PROVISIONS AS TO RISK AND PERILS INSURED AGAINST

30. The written contract of insurance is called a "policy."

The better opinion is that the word "policy" is from the Latin "polliceor"—"I promise." The forms of policies vary. The most common is the English form, which has been in use for a long time, and the American forms in use in Boston and New York. These vary materially in their general provisions, and, of course, the stipulations in them are varied to suit the special circumstances.

The English form will be found in appendix No. 1 of Park on Insurance. It has been frequently criticised by the courts as ambiguous and inartificial, but its various provisions have now been so generally construed that it is well understood.[80]

A good example of the American form will be found in SUN MUT. INS. CO. v. OCEAN INS. CO.[81] This was a reinsurance policy on goods, but the important clauses commonly in use will be found embodied in it.

Of the Beginning and End of the Risk

The clause in the English form bearing upon this is worded as follows: "Beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship * * * upon the said ship," etc., "and so shall continue and endure during her abode there, upon the said ship," etc. "And, further, until the said ship, with all her ordnance, tackle, apparel," etc., "and goods and mer-

§ 30. [80] The common or "stem" form of the English Lloyds is given in full in Gow on Marine Insurance, 29.

[81] 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

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chandise whatsoever shall be arrived at ——— upon the said ship," etc., "until she hath moored at anchor twenty-four hours, in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed."

The American policy above referred to expresses all this more simply, as follows: "Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board of the said vessel at ——— aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at ——— aforesaid."

In filling up the blank indicating the voyage, the initial point is frequently described as "at and from ——— to ———." The meaning of these words varies according to circumstances. They cover injuries received in the initial port in the ordinary course of preparing for the voyage, provided the delay is not unreasonable. For instance, the LISCARD [82] was a case of insurance on a cargo of wheat "at and from New York," and bound for Lisbon. After the loading of the vessel, the signing of her bills of lading, and other preparations to leave port, the vessel cast off her lines for the purpose of starting, but, on account of some trifling derangement of her engines, again made fast to her wharf. While lying there she was run into by a barge. She was surveyed, pronounced seaworthy, and started, meeting very heavy weather, which caused water to damage the wheat. The court held that the policy had attached at the time of this collision.

In Haughton v. Empire Marine Ins. Co.[83] a vessel while

[82] (D. C.) 56 Fed. 44; London Assurance v. Companhia De Moagens Do Barreiro, 15 C. C. A. 379, 68 Fed. 247; Id., 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113. As to the meaning of "breaking ground," see 1 Pars. Mar. Ins. 357 et seq.; 2 Pars. Mar. Ins. 48, 49. In the Gracie D. Chambers, 253 Fed. 182, 184, 165 C. C. A. 82, Judge Ward says that a ship had broken ground "if she had sailed a mile."

[83] L. R. 1 Ex. 206.

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at sea was insured "lost or not lost, at and from Havana to Greenock." In entering the harbor of Havana she grounded, and received damage. The court held that under such circumstances the words were used in a geographical sense, the ship being in the geographical limits of the harbor of Havana in the sense of the policy, and that, therefore, the policy had attached. In this case the injury was received from the anchor of another ship in the harbor after her arrival within its limits.

Seamans v. Loring [84] was a decision of Mr. Justice Story. In reference to the meaning of these words he says: "The next question is, at what time, if ever, did the policy attach? The insurance is 'at and from,' etc. What is the true construction of these words in policies must, in some measure, depend upon the state of things and the situation of the parties at the time of underwriting the policy. If at that time the vessel is abroad in a foreign port, or expected to arrive at such port in the course of the voyage, the policy, by the word 'at,' will attach upon the vessel and cargo from the time of her arrival at such port. If, on the other hand, the vessel has been at no time in such port without reference to any particular voyage, the policy will attach only from the time that preparations are begun to be made with reference to the voyage insured." In this case there was an unreasonable delay in sailing, and he instructed the jury that such an unreasonable and unnecessary delay prevented the policy from attaching during this preparation, and that the policy did not attach until the vessel began her preparations for the voyage insured.

As to the question when the voyage terminates, the courts have held that it lasts, under the language of the policy, until she has been moored twenty-four hours in good safety, and that a vessel which arrives as a wreck incapable of repair, and is lost in the port of final destination under such circumstances, even after being moored, has never

[84] 1 Mason, 127, Fed. Cas. No. 12,583.

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arrived "in good safety," in the meaning of this clause, and that, therefore, the underwriters are liable.[85]

An interesting case on the meaning of these words "in good safety" is LIDGETT v. SECRETAN.[86] There the ship Charlemagne insured from London to Calcutta, with this clause in the policy, sustained considerable damage at sea, so as to require constant pumping, but still not so serious as to make her an absolute wreck. She arrived at Calcutta in this condition on October 28, 1866. After unloading she was taken on November 12th to a dry dock for survey and repairs, and was destroyed by accidental fire on December 5th. The court held that, as she had arrived, and been moored for twenty-four hours in good safety as a ship, and not as a mere wreck, the risk had terminated, and the underwriters were liable for the loss incurred before entering the port, but not for the fire which had happened after such anchoring.

The anchoring must be at the place of final discharge. Coming to anchor in port with the intention of entering the dock afterwards is not a final mooring in the sense of this clause.[87]

The Perils Insured Against

The ordinary language in an English policy enumerating the perils is as follows: "Touching the adventures and perils which we, the assurers, are content to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and peo-

[85] Shawe v. Felton, 2 East, 109. See, also, as to the termination of the voyage or risk, Alaska Banking & Safe Deposit Co. v. Maritime Ins. Co. (D. C.) 156 Fed. 710; Cornfoot v. Assurance Corp., [1903] 2 K. B. 363.

[86] L. R. 5 C. P. 190.

[87] Samuel v. Assurance Co., 8 B. & C. (15 E. C. L. 60) 119, 118 Reprint, 987.

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ple of what nation, quality, or condition soever, barratry of the masters and mariners, and all other perils, losses, or misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship."

The "restraint of princes" clause refers to acts of state or acts authorized by the sovereign authority.[88] It does not cover losses caused by riots.[89]

SAME—PERILS OF THE SEAS

31. "Perils of the seas" mean all losses or damage which arise from the extraordinary action of the wind and sea, or from extraordinary causes external to the ship, and originating on navigable waters.

The phrase does not cover ordinary wear and tear, nor does it cover rough weather or cross seas. There must be something extraordinary connected with it.[90] Under this principle the Supreme Court has held that injury to a vessel from worms in the Pacific, if an ordinary occurrence in that locality, is not included in the phrase.[91]

On the other hand, injuries received from accidentally striking the river bank in landing, in consequence of which the vessel sank, are included in the term.[92]

It also covers a loss caused by a jettison of part of the cargo.[93]

In Potter v. Suffolk Ins. Co.,[94] Mr. Justice Story held that injury caused to a ship by striking on some hard sub-

[88] Miller v. Insurance Co., [1902] 2 K. B. 694; [1903] 1 K. B. 712; Robinson G. M. Co. v. Ins. Co., [1904] A. C. 359.

[89] Nesbitt v. Lushington, 4 T. R. 783, 100 Eng. Reprint, 1300.

§ 31. [90] Gulnare (C. C.) 42 Fed. 861.

[91] Hazard v. New England M. Ins. Co., 8 Pet. 557, 8 L. Ed. 1043.

[92] Seaman v. Enterprise Fire & Marine Ins. Co. (C. C.) 21 Fed. 778.

[93] Lawrence v. Minturn, 17 How. 100, 15 L. Ed. 58.

[94] 2 Sumn. 197, Fed. Cas. No. 11,339. See, also, Wells v. Hopwood, 3 B. & Ad. 20, 110 Eng. Reprint, 8.

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stance in the harbor, due to the ebbing of the tide, is a loss by a peril of the sea, unless it was mere wear and tear, or unless it was an ordinary and natural occurrence. Injuries caused by the negligence of the master or crew are also covered, unless, there is an express stipulation against them —as is not uncommon.[95]

In policies which contain an exception protecting the insurer from injuries caused by lack of ordinary care and skill of the navigators, it is the tendency of the courts to construe this phrase strictly against the insurer. They construe it in such cases to apply rather to the general qualifications of the crew than to their carelessness in particular instances.[96]

The courts also hold that injuries received by collision with another vessel are covered, though not injuries inflicted. This question is discussed in the case of GENERAL MUT. INS. CO. v. SHERWOOD,[97] in which the opinion was rendered by Mr. Justice Curtis.

In Peters v. Warren Ins. Co.,[98] the court held that under the term "perils of the sea" the insured could recover not only the damage received by his vessel, but the amount that he had to pay in general average, under the provisions of the German law, to the other vessel. As to the latter part of this decision, however, it turned upon the peculiar provisions of the German law of average, making the vessel liable in such case even without fault. But it was not intended by the Supreme Court in that case to decide the general proposition that the above term quoted in the policy gave the right to recover for injuries inflicted.

In this respect the law of England is the same as that of America.[99]

[95] Rogers v. Ætna Ins. Co., 35 C. C. A. 396, 95 Fed. 103; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63.

[96] Egbert v. St. Paul Fire & Marine Ins. Co. (D. C.) 71 Fed. 739.

[97] 14 How. 357, 366-367, 14 L. Ed. 452.

[98] 14 Pet. 99, 10 L. Ed. 371.

[99] De Vaux v. Salvador, 4 A. & E. (31 E. C. L. 195) 420.

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The clause covers fire caused by negligence of the crew, the proximate cause in that case being taken to be the fire; but, if the fire was caused not by the mere negligence, but by design, then the proximate cause would not be the fire, but the design, and the underwriter would be liable if his policy covered barratry, but not if otherwise.[1]

In the G. R. Booth, Mr. Justice Gray discusses the meaning of the clause in a bill of lading, and says that it has the same meaning as in an insurance policy, except that negligence of the master has a different effect in the two contracts.[2]

SAME—BARRATRY

32. Barratry is an act committed by the master or mariners of the ship for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury.

The above is the definition given by Justice Story in Marcardier v. Chesapeake Ins. Co.[3]

The meaning of the term is discussed at great length and learnedly in PATAPSCO INS. CO. v. COULTER.[4] It seems to exclude the idea of mere negligence, to involve at least some element of design or intention or negligence so gross as to be evidence of such design or intention. In that case the final decision was that, where the loss was caused by a fire, and it appeared that the master and crew did not take proper steps to extinguish the fire, the cause of loss was the fire, and not the negligence of the crew, and therefore they held the insurer liable.

In the more recent case of New Orleans Ins. Co. v. Albro

[1] Waters v. Merchants' Louisville Ins. Co., 11 Pet. 213, 9 L. Ed. 691.
[2] 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234.
§ 32. [3] 8 Cranch, 39, 3 L. Ed. 481.
[4] 3 Pet. 222, 7 L. Ed. 659.

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Co.,[5] a voyage had been broken up, and the cargo sold. It was charged that the master made the sale in a method knowingly contrary to his best judgment, and to the injury of the parties interested. The court held that this, if so, would constitute barratry.

As barratry is something done to the prejudice of the owners, it follows that the master who is sole owner cannot commit barratry, as a man can hardly cheat himself; but, if he is part owner, he can be guilty of barratry towards his other owners.[6]

SAME—THEFTS

33. Thefts in a marine policy, according to the better opinion, cover thefts from without the ship, and do not cover thefts by the crew.

This is the decision according to the great preponderance of English authority.[7] Parsons, in his Marine Insurance, states that the weight of American authority would make the insurers liable for larceny by the crew.[8] His citations, however, hardly seem strong enough to meet the reasoning of the English cases.

[5] 112 U. S. 506, 5 Sup. Ct. 289, 28 L. Ed. 809. In Compania de Navigacion La Flecha v. Brauer, 168 U. S. 118, 18 Sup. Ct. 12, 42 L. Ed. 398, Mr. Justice Gray held that "there was no barratry, because there was neither intentional fraud, nor breach of trust, nor willful violation of law, one of which, at least, is necessary to constitute barratry."

[6] Marcardier v. Chesapeake Ins. Co., 8 Cranch, 39, 3 L. Ed. 481; Jones v. Nicholson, 10 Ex. 28.

§ 33. [7] Taylor v. Steamship Co., L. R. 9 Q. B. 546. This case also holds that thefts are not covered by a clause insuring against "damage to goods."

[8] 1 Pars. Mar. Ins. 563-566, and notes.

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SAME—ALL OTHER PERILS

34. "All other perils," etc., mean all other perils of the same general character.

These words, according to the construction placed upon them by the courts under the rule of ejusdem generis, are intended as a general safeguard to cover losses similar to those guarded against by the special enumeration, and not in as sweeping a sense as the language would mean.

The English Marine Insurance Act, 1906 (under the rules of construction annexed to the first schedule of section 30), expresses this as "only perils, similar in kind to the perils specifically mentioned in the policy."

But "all risks by land and water" cover all risks whatsoever.[9]

The leading case as to the meaning of these words is THAMES & M. MARINE INS. CO. v. HAMILTON,[10] wherein Lord Bramwell, in his opinion, in reference to the meaning of these words, uses the following language: "Definitions are most difficult, but Lord Ellenborough's seems right: 'All cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes.' I have had given to me the following definition or description of what would be included in the general words: 'Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance.' Probably a severe criticism might detect some faults in this. There are few definitions in which that could not be done. I think the definition of Lopes, L. J., in Pandorf v. Hamilton [16 Q. B. D. 629], very good: 'In a seaworthy ship, damage of goods caused

§ 34. [9] Schloss v. Stevens, [1906] 2 K. B. 665.
[10] 12 A. C. 484.

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by the action of the sea during transit, not attributable to the fault of anybody,' is a damage from a peril of the sea. I have thought that the following might suffice: 'All perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such.'" And Lord Herschell, in his opinion, discusses the cases which had previously passed upon them. The case was an insurance under a time policy, in which, under English law, as previously stated, there is no implied warranty. The donkey engine was being used pumping water into the main boilers, but, owing to the fact that a valve was closed which ought to have been left open, the water was forced into and split open the air chamber of the donkey pump. The court held that, whether the closing of the valve was accidental or due to the negligence of the engineer, it was not such an accident as was covered either by the words "perils of the sea," or by the general saving clause above quoted.

PROXIMATE CAUSE OF LOSS

35. Where an injury is due to more than one cause, the efficient predominating cause nearest the loss is considered the proximate cause, though later causes incidental thereto are also set in motion. Any later cause, to supersede the first, must be an independent cause.

This definition is the result of the decisions of the United States Supreme Court in HOWARD FIRE INS. CO. v. NORWICH & N. Y. TRANSP. CO.[11] and the G. R. Booth,[12] where the subject is thoroughly discussed.

The question what is the proximate and what the remote cause gives rise to some of the most difficult points in marine insurance law. The only general rule is that

§ 35. [11] 12 Wall. 194, 20 L. Ed. 378.
[12] 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234.

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laid down above, and, like most general rules, its difficulties lie in its application.

In IONIDES v. UNIVERSAL MARINE INS. CO.,[13] a vessel loaded with coffee was insured under the ordinary policy, which contained a warranty "free from all consequences of hostilities." It was during the Civil War, and the Confederates had extinguished Hatteras Light as a means of embarrassing the navigation of the Federal ships. The captain, on his way from New Orleans to New York, supposing that he had passed Cape Hatteras, when he had not, changed his course in such a way that his vessel went ashore. The Confederate authorities took him and his crew as prisoners. Federal salvors came down, and saved part of the coffee, and might have saved more but for the interference of Confederate troops. In a day or two the vessel was lost. The court held, under these circumstances, that, as to that part of the coffee which remained aboard, it was lost by a peril of the sea, that being the proximate cause, and not the act of the Confederates in extinguishing the light; but that as to the cargo which was saved, and as to that part which could have been saved but for the interference of the Confederate authorities, the proximate cause was the consequence of hostilities, and that as to that part the underwriters were not liable.

In Mercantile S. S. Co. v. Tyser,[14] the insurance was on

[13] 14 C. B. N. S. (108 E. C. L.) 259, 143 Reprint, 445. During the World War, it has been customary to insure ships, whether through government insurance or otherwise, against war risks which would not be covered by the ordinary provisions of a marine policy. The same question has also arisen in the construction of similar provisions in charter parties, and it has been necessary in many cases to decide whether a given loss falls upon the ordinary insurance policy or the war policy, in other words, whether it was a war risk or a sea risk. See Lobitos Oil Fields v. Admiralty Commissioners, 34 T. L. R. 466; British & Foreign S. S. Co. v. The King, 34

[14] 7 Q. B. D. 73. A somewhat analogous case is Williams v. Canton Ins. Co., [1901] A. C. 462.

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freight during a certain voyage. The charter party contained a clause that the charterers might cancel the charter party if the vessel did not arrive by the 1st of September. The ship started from England on the 7th of August, but her machinery broke down, and she had to put back. The time lost caused her to arrive in New York after the 1st of September, and the charterers canceled the charter party. The court held that the proximate cause of the loss of freight was not the breaking down of the machinery, but the option exercised by the charterers of canceling the charter party, and that, therefore, the underwriters were not liable.

In Dole v. New England Mut. Marine Ins. Co.,[15] a vessel was captured by the Confederate cruiser Sumter. As she could not be brought into any port of condemnation, her captors set her on fire and destroyed her. The policy contained a clause warranted free from capture. It was argued, inter alia, that the proximate cause of the loss was the fire, and not the capture. Justice Clifford held, however, that the proximate cause was the capture and the acts of the captors, and that the underwriters were not liable.

HOWARD FIRE INS. CO. v. NORWICH & N. Y. TRANSP. CO.[16] arose under a fire insurance policy. The steamer Norwich collided with a schooner, injuring her own hull below the water line. She rapidly began to fill, and 10 or 15 minutes after the collision the water reached the fire of the furnace, and the steam thereby caused blew the fire around, and set fire to the woodwork of the boat. In consequence, she burned until she sank in deep water. The injury from the collision alone would not have made

T. L. R. 546, [1918] 2 K. B. 879. British India Steam Nav. Co. v. Green, 35 T. L. R. 269; Britain Steamship Co. v. The King, Id. 271; Ard Coasters, Ltd., v. The King, Id. 604.

[15] 2 Cliff. 394, Fed. Cas. No. 3,966.

[16] 12 Wall. 194, 20 L. Ed. 378.

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her sink. The court held that the fire was the efficient predominating cause nearest in time to the catastrophe, and that the underwriters were liable for that part of the injury which was caused by the fire.

In Orient Mut. Ins. Co. v. Adams,[17] the master of the steamer Alice, lying above the falls of the Ohio near Louisville, gave the signal to cast the boat loose, and started when she did not have steam enough to manage her. There was no clause in the policy exempting the insurers from liability for the negligence of the master or crew. The vessel was carried over the falls, and the court held that the proximate cause was the damage done by going over the falls, which was a peril of navigation, and not the act of the master, that being a remote cause.

A like application of the rule is made to the sale of cargo in an intermediate port of distress to raise funds. Such a loss is not recoverable under the policy, as the sea peril that caused the vessel to enter the port of distress is deemed a remote cause.[18]

THE LOSS—TOTAL OR PARTIAL

36. A loss may be total or partial.

37. ACTUAL OR CONSTRUCTIVE—

A total loss may be actual or constructive.

(a) There is an actual total loss where the subject-matter is wholly destroyed or lost to the insured, or where there remains nothing of value to be abandoned to the insurer.

(b) There is a constructive total loss when the insured has the right to abandon.

[17] 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63.

[18] Powell v. Gudgeon, 5 Maule & S. 431; Ruckman v. Merchants' Louisville Ins. Co., 5 Duer (N. Y.) 371.

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Actual Total Loss of Vessel

An actual total loss of a ship occurs when she is so injured that she no longer exists in specie as a ship. If she still retains the form of a ship, and is susceptible of repair, it is not an actual total loss.

In BARKER v. JANSON,[19] Wills, J., says: "If a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purpose of a ship; but if it can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship."

In Delaware Mut. Safety Ins. Co. v. Gossler,[20] Clifford, J., uses substantially the same language.

Actual Total Loss of Goods

There is a total loss of goods not only when they are absolutely destroyed, but when they are in such a state that they cannot be carried in specie to the port of destination without danger to the health of the crew, or when they are in such a state of putrefaction that they have to be thrown overboard from fear of disease.[21]

Interesting questions arise when there is an insurance against total loss only on goods and part of the goods are lost. If the goods are all of the same kind, and a part of them are lost, then, under the ordinary language of the policy, the loss would be partial only. But, if there were different kinds of goods insured under one policy, the courts hold, unless the language of the policy is specially worded to exclude it, that there is a total loss of separate articles, though there may not be a total loss of the whole.

This question is discussed in Woodside v. Canton Ins.

§§ 36-37. [19] L. R. 3 C. P. 303.

[20] 96 U. S. 645, 24 L. Ed. 863. See, also, Fireman's Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618, 149 C. C. A. 614.

[21] Hugg v. Augusta Ins. Co., 7 How. 595, 12 L. Ed. 834.

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Office.[22] That was an insurance against total loss only, or, what has been held to mean about the same thing, "warranted free from all average," on personal effects of the master of the vessel. The personal effects consisted of a variety of different articles. The vessel was lost, and so were all the master's effects, except a sextant and a few small articles. The court held that there was a total loss of the different articles which were not saved, although some of the personal effects were saved.

On the other hand, in Biays v. Chesapeake Ins. Co.,[23] the insurance was on a cargo of hides. Some of the hides were entirely lost. The court held, however, that as the insurance covered only one article, namely, hides, this was a partial loss on the entire subject of insurance, and not a total loss of some of the different subjects of insurance.

But where the subject insured is a single unit, though composed of different parts, the loss of one of those parts, which renders the others absolutely useless, and which could not be replaced at an expense less than the cost of the entire unit, makes it a total loss.

In Great Western Ins. Co. v. Fogarty,[24] there was insurance upon a sugar-packing machine composed of various different units. Some of these parts were lost, and could not have been replaced for less than the price of a new machine. Some were saved, but were only valuable as scrap iron. The court held that this was a destruction of the machine in specie, and therefore a total loss.

Actual Total Loss of Freight

There is a total loss of freight whenever there is a total loss of cargo or when the voyage is broken up and no

[22] (D. C.) 84 Fed. 283; Canton Ins. Office v. Woodside, 33 C. C. A. 63, 90 Fed. 301. See, also, Duff v. McKenzie, 3 C. B. (N. S.) 16 (91 E. C. L.); Wilkinson v. Hyde, 3 C. B. (N. S.) 30 (91 E. C. L.); Ralli v. Janson, 6 E. & B. 422, 119 Eng. Reprint, 922.

[23] 7 Cranch, 415, 3 L. Ed. 389. See, also, Washburn & M. Mfg. Co. v. Reliance M. Ins. Co., 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49.

[24] 19 Wall. 640, 22 L. Ed. 216.

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freight is earned. But if the vessel can be repaired in sufficient time to carry her cargo without frustrating the objects of the voyage by delay, or the cargo is in a condition to be shipped by another vessel and another vessel is procurable, there is not a total loss of freight.[25]

Partial Loss

The term "particular average" is nearly synonymous with "partial loss," and policies which contain clauses "warranted against particular average" or "warranted against average" are practically policies insuring against total loss only.[26]

The measure of recovery in case of partial loss is strikingly different in marine and fire insurance. If a house is insured against fire for $5,000, and the value of the house is $10,000 and the loss is $5,000, the insured recovers the full value of his policy. Under similar circumstances in marine insurance, he only recovers such proportion of the loss as the insured portion bears to the total value, it being considered that as to that part of the value which is not insured he is his own insurer, and must contribute to the loss to that extent.[27] In arriving at these proportions, the

[25] Hugg v. Augusta Ins. Co., 7 How. 595, 12 L. Ed. 834; Jordan v. Warren Ins. Co., 1 Story, 342, Fed. Cas. No. 7,524.

[26] Lowndes on Marine Insurance (2d Ed.) 70, defines particular average as "loss or damage of the thing insured, not amounting to total loss, and not including the cost of measures taken for its preservation from a greater loss." Gow on Marine Insurance, p. 189, defines it as "the liability attaching to a marine insurance policy in respect of damage or partial loss accidentally and immediately caused by some of the perils insured against, to some particular interest (as the ship alone, or the cargo alone) which has arrived at the destination of the venture." In Kidston v. Empire Marine Insurance Co., L. R. 1 C. P. 535, 2 C. P. 357, the cost of measures taken for preservation from greater loss is excluded as particular average and dubbed "particular charges."

[27] 2 Pars. Mar. Ins. 405; Ursula Bright S. S. Co. v. Amsinck (D. C.) 115 Fed. 242; Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.

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actual value of the subject insured is taken, except where there is an insured value fixed in the policy, in which case the insured value is taken.

SAME—ABANDONMENT

38. Abandonment is the surrender by the insured, on a constructive total loss, of all his interest, to the insurer, in order to claim the whole insurance.

(a) Under the American rule, if the cost of saving and repairing a vessel exceed one-half her value when repaired, the owner, by giving the underwriter notice of abandonment, may surrender his vessel to the underwriter, and claim for a total loss.

(b) Under the English rule, he can do the same thing if the ship is so much injured that she would not be worth the cost of repair.

This is the most radical difference between the American and English law of marine insurance. Under the American law, as stated above, the right of abandonment is governed by the facts as they appear at the time of the abandonment. If, therefore, at that time, under the highest degree of probability, the cost of saving and repairing the vessel would exceed one-half of her value when repaired, the insured may abandon.[28]

The title of an insurer acquired by an abandonment relates back to the disaster.[29]

In the absence of special stipulations, the cost must exceed one-half the value of the vessel when repaired at the

(D. C.) 185 Fed. 172; Atlantic Mut. Ins. Co. v. Peninsular & O. S. S. Co., 194 Fed. 84, 114 C. C. A. 162.

§ 38. [28] Bradlie v. Maryland Ins. Co., 12 Pet. 378, 9 L. Ed. 1123; Royal Exch. Assur. v. Graham & Morton Transp. Co., 166 Fed. 32, 92 C. C. A. 66; Fireman's Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618, 149 C. C. A. 614.

[29] Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43.

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place of disaster, and the policy value of the vessel or her value in the home port is no criterion.

In consequence of these decisions, it has become common to provide in the policy that the right of abandonment shall not exist unless the cost of repairs exceeds one-half the agreed valuation. Such a stipulation is valid, but there also the right of abandonment is determined by the facts as they exist at the time, and is not devested by the fact that the vessel may subsequently be saved for less.[30] Currie v. Bombay Native Ins. Co.[31] was a case of insurance on cargo and disbursements. The vessel was wrecked, and the captain made no effort to save the cargo, deeming it impracticable. It appeared from the facts that the cargo could have been partially saved if he had. The ship was a total wreck. The court held that this was not a total loss of the cargo by the peril insured against, but that it was a total loss of the disbursements.

SAME—AGREED VALUATION

39. The valuation fixed in the policy is binding, though it may differ from the actual value.

In passing upon the rights and obligations of insured and underwriters, the valuation in the policy, except as above stated, is taken as conclusive upon the parties. Although this may sometimes partake of the nature of wager policies, yet the convenience of having a certain valuation as a basis to figure on, and the diminution of litigation thereby, have caused the courts to hold the parties to their valuation. The firmness with which they hold to this doctrine may be judged by BARKER v. JANSON,[32] where, at the

[30] Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63.

[31] L. R. 3 P. C. 72.

§ 39. [32] L. R. 3 C. P. 303.

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time the policy attached, the ship, on account of injuries, was practically of no value at all; yet the court held both parties bound by the valuation.

In North of England Iron S. S. Ins. Ass'n v. Armstrong,[83] a policy of insurance was effected for £6,000 on a vessel valued at £6,000. She was sunk in collision, and the underwriters paid for a total loss. Her real value was £9,000. Subsequently £5,000 was recovered from the colliding vessel. The court held that it all belonged to the underwriter by subrogation to the insured, and that the assured could not take any part of it in payment for the actual valuation of his vessel uninsured.

On the other hand, in the Livingstone[84] the Circuit Court of Appeals for the Second Circuit held that, where the recovery from the wrongdoer exceeded the value of the policy, the underwriter was entitled only to such part of the recovery as reimbursed him for the amount paid out, and that any excess over the insured value went to the owner of the ship.

The basis of the American holding is that the insurer ought not in equity to expect more than he had paid out. The basis of the English holding is that an abandonment vests the title in the underwriter as of the time of the disaster, that if he subsequently raises the wreck it is his, that the damages recoverable from the other party are nothing more than a substitute for the wreck, and that the insured was responsible for any hardship, as it was the result of the undervaluation, on the basis of which he had paid the premium.

It must be confessed that the English reasoning is substantial logic, if not substantial justice.

The idea that the damages recoverable from the wrongdoer are a substitute for the vessel is elementary in Ameri-

[83] L. R. 5 Q. B. 244.

[84] 130 Fed. 746, 65 C. C. A. 610, reversing a strong opinion by Judge Hazel (D. C.) 122 Fed. 278.

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can law. For instance, where a vessel owner desires to claim the benefit of the Limited Liability Act and surrenders his vessel for the benefit of her creditors, the right of action against a third party for the damage goes with it.[85]

In another respect the American and English decisions diverge as to the effect of a valuation in a policy.

In a salvage case, the salvage award is apportioned between vessel and cargo according to values, which are passed upon by the court as one of the facts in the case. As the salvors look to the properties salved, they are not bound by or concerned with any valuation that may be agreed upon between owners and insurers in a policy. Now suppose that in a proceeding to recover salvage the court finds as a fact that the ship is worth $100,000 and the cargo $50,000; and that an award of $30,000 is made on such valuations. The vessel would be liable to the salvors for $20,000 of this, and the cargo for $10,000.

Now suppose that the owner has insured his ship on a valuation of $75,000. If this value were taken in distributing the salvage award, the proportionate share of the ship would be $18,000 and of the cargo $12,000. As salvage is a peril of the sea, there is no question of the insurer's obligation to refund one of these two sums to the owner.

In America it is held that the insurer must refund to the insured the amount charged against the ship in the court proceeding, regardless of the method of arriving at the values which the court may adopt, provided the total amount recovered on the policy is within the policy limit; that the other rule would make the owner a constructive insurer of the excess of value over the policy valuation and result in holding him to the policy valuation while not holding the insurer to it.[86]

[85] Post, § 169, p. 369.

[86] International Nav. Co. v. British & Foreign Marine Ins. Co. (D. C.) 100 Fed. 304. The decision was in 1900, by Judge Addison Brown of New York.

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On the other hand, the English courts hold that the liability of the insurer must be settled by the terms of the contract between him and his insured, that he is liable only for that part of the salvage represented by the valuation named in such contract, and that to make him pay the entire amount would be to let the insured collect out of his policy on an interest which he, the insured, had purposely left uncovered and on which he had paid no premium.[87]

SAME—SUBROGATION OF INSURER

40. An insurer who has paid the insurance is subrogated to the rights of the insured against others liable to the insured for the loss.

The insured is entitled to recover his loss from the underwriter, though he may possess other remedies for it. For instance, if he can recover back part of the loss in general average, the underwriter must still pay him, and look to the collection of the average himself, and not force the insured to exhaust his remedies on general average.[88]

But, when the underwriter has paid the loss, he is entitled by subrogation to all the rights of the insured against any other parties for the recovery of all or part of what he has paid. In such case, he stands in the shoes of the assured, and has no greater rights than the assured himself would have, so that if the assured has stipulated away his right by any enforceable clause in a bill of lading or otherwise, the underwriter cannot recover. This right of subro-

[87] Balmoral S. S. Co. v. Marten, [1900] 2 Q. B. 748; [1901] 2 K. B. 896; [1902] A. C. 511. It is noteworthy that the English judges all agreed, including Bigham in the trial court, A. L. Smith, Vaughan, and Stirling in the Court of Appeal, and Lords Macnaghten, Shand, Brampton, Robertson, and Lindley in the House of Lords. To the author the argument seems all in favor of their view.

§ 40. [88] International Nav. Co. v. British & Foreign Marine Ins. Co. (D. C.) 100 Fed. 304.

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gation springs, not necessarily from assignment, but from the general principles of equity.[39]

SAME—SUING AND LABORING CLAUSE

41. In addition to the amount of his loss, the insured may recover, under the suing and laboring clause of the policy, expenses incurred by him in protecting the property.

In the old English policy this clause was in the following language: "And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor and travel for, in, and about the defense, safeguard, and recovery of the said goods and merchandise, and ship," etc., "or any part thereof, without prejudice to this insurance."

In later policies the clause has been modified largely in the interests of the underwriter, but the general language is the same. This clause is intended, in mutual interest, to encourage the assured to do everything towards making the loss as light as possible; and the expenses thereby incurred are recoverable outside of the other clauses of the policy, though in some instances it enables the assured to recover more than the face value of the policy. In other words, the assured may recover a certain amount under that clause of the policy giving him the right to recover for loss caused by the perils of the sea, etc., and this additional amount as expended for the general benefit, and this, too, often in policies insuring against total loss only. And,

[39] See, as illustrating the extent of this doctrine, Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Wager v. Providence Ins. Co., 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013; Fairgrieve v. Marine Ins. Co., 37 C. C. A. 190, 94 Fed. 686; Hall v. Nashville & C. R. Co., 13 Wall. 367, 20 L. Ed. 594.

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since an abandonment under the American decisions relates back, the underwriters are liable for the acts of the master after abandonment, as he is then their agent.[40]

The acts of the insurer or the underwriter, in sending and making efforts to save, cannot be construed as an acceptance of the abandonment.[41]

The clause does not cover legal expenses incurred in defending the ship against an unsuccessful attempt to hold her liable for damages in the collision out of which the loss arose.[42]

This clause, however, only covers such acts of the underwriter as are authorized by the policy. If the underwriter takes the vessel to repair her, intending to return her, and keeps her an unreasonable time, and then returns her, not in as good condition as she was before, the suing and laboring clause will not protect him, and his acts in so doing, being unauthorized by the suing and laboring clause, will be held an acceptance of the notice of abandonment.[43]

§ 41. [40] Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43.

[41] RICHELIEU & O. NAV. CO. v. BOSTON MARINE INS. CO., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

[42] Munson v. Standard Marine Ins. Co., 156 Fed. 44, 84 C. C. A. 210.

[43] Washburn & M. Mfg. Co. v. Reliance M. Ins. Co., 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49; Copelin v. Phœnix Ins. Co., 9 Wall. 461, 19 L. Ed. 739.

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CHAPTER IV

OF BOTTOMRY AND RESPONDENTIA; AND LIENS FOR SUPPLIES, REPAIRS, AND OTHER NECESSARIES

42. "Bottomry" Defined.
43. Requisites of Bottomry Bond.
44. Respondentia.
45. Supplies, Repairs, and Other Necessaries.
46. "Material Man" Defined.
47. Necessaries Furnished in Foreign Ports.
48. "Necessaries" Defined.
49. Necessaries Furnished Domestic Vessels.
50. Domestic Liens as Affected by Owner's Presence.
51. Shipbuilding Contracts.
52. Vessels Affected by State Statutes.

"BOTTOMRY" DEFINED

42. This is an obligation executed generally in a foreign port by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed upon, which bond creates a lien on the ship enforceable in admiralty in case of her safe arrival at the port of destination, but becoming absolutely void and of no effect in case of her loss before arrival.[1]

This is an express lien created by act of the parties.

The Admiralty Lien

Admiralty is not a difficult branch of the law, and the difficulties of this part arise not inherently, but from the confusion incident to the use of the word "lien." To the student of the common law its use suggests the ideas which our studies in that branch associate with it; and, even if

§ 42. [1] GRAPESHOT, 9 Wall. 129, 19 L. Ed. 651.

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there was such a production in those modern specialist times as an admiralty lawyer ignorant of all other law, the confusion would still exist to a lesser extent, since the word is used in different senses in marine law itself.

The admiralty lien, pure and simple, is strikingly dissimilar from the common-law lien. Take a common-law mortgage as an illustration. There the title to the security is conditionally conveyed to the creditor and he has a property interest in it. Take, on the other hand, the hotel keeper who retains the trunks of his guests till they pay for their wine. The moment he relinquishes possession of the trunks he loses his security, for his lien depends on possession. In other words, the common-law liens give the creditor a qualified title or right of possession as security for a personal debt due by the owner and as incident to such a debt.

The admiralty lien is different. Its holder has no right of possession in the ship. It exists as a demand against the ship itself as a contracting or wrongdoing thing, irrespective of the fact whether the creditor has any personal action against the owner or not. It is not a mere incident to a debt against the owner, but a right of action against the thing itself—a right to proceed in rem against the ship by name, in which the owner is ignored, may never appear, and appears, if at all, not as defendant, but as claimant. It is nearer what the civil law terms a "hypothecation"—a privilege to take and sell by judicial proceedings in order to satisfy your demand. This shows how little it has in common with the common-law lien.[2]

As said above, there are liens in admiralty law enforceable by admiralty process which yet are not admiralty liens in the above sense. Such is the lien of the ship on the cargo for freight and demurrage, which is lost by delivery. It is to be regretted that the term was not limited to such cas-

[2] Pleroma (D. C.) 175 Fed. 639; Mayer's Admiralty Jur. & Pr. 55.

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es, and some better expression, such as a privilege or right of arrest, substituted in the others.

The lien by bottomry is a good instance of maritime hypothecation. It is a debt of the ship, arises out of the necessities of the ship, and is good only against the ship. If the ship meets with a marine disaster, and seeks shelter and restoration in a port where she and her owners are strangers without credit, her master may borrow money for the purpose of refitment, and secure it by a bond pledging the vessel for its payment, on arrival at her destination. As the bond provides that it shall be void in case she does not arrive, the principal is at risk, and therefore a high rate of interest may be charged without violating the usury laws.[3]

The loss which avoids a bottomry bond is an actual total loss. The doctrine of constructive total loss is found only in the law of marine insurance, and does not apply in considering the law of bottomry.[4]

REQUISITES OF BOTTOMRY BOND

43. The requisites for the validity of a bottomry bond are that the repairs or supplies must be necessary, and that the master or owner has no apparent funds or credit available in the port.

But, if the lender satisfies himself that the supplies are necessary, he may, in the absence of knowledge, actual or constructive, as to the existence of funds or credit, presume, from the fact that the master orders them, that there is a necessity for the loan, and his lien will be upheld, in the absence of bad faith.

It is the duty of the master to communicate with the owner of the ship or cargo proposed to be bottomried if

[3] Northern Light (D. C.) 106 Fed. 748.

[4] Delaware Mut. Safety Ins. Co. v. Gossler, 96 U. S. 645, 24 L. Ed. 863; Great Pacific, L. R. 2 P. C. 516.

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he can.[5] The modern facilities for communication and ease of transferring funds from port to port have rendered bottomry bonds less common than in former times. In America the right to bind a vessel for repairs and supplies as a maritime contract without any bottomry renders them rarely needed.

The holder of a bottomry bond must enforce it promptly after the arrival of the ship, or he will be postponed to any subsequently vested interests.[6]

Among different bottomry bonds the last is paid first. This is another sharp distinction between admiralty and common-law liens. Among admiralty liens of the same general character, the last takes precedence; the theory being that the last is for the benefit of the preceding ones, and contributes to saving the ship in the best possible condition for all concerned.[7]

The case of O'Brien v. Miller[8] contains a form of bottomry bond printed in full.

RESPONDENTIA

44. This is a hypothecation of cargo, similar in nature, purposes, requisites, and effect to the hypothecation of the vessel by bottomry.

A bottomry bond may hypothecate not only the vessel but the cargo. If it is on the cargo alone it is called a "respondentia bond." Since the master has greater powers as agent of the vessel owner than he has as agent of the cargo owner, it requires a stronger necessity and a stronger effort to communicate with the cargo owner in order to

§ 43. [5] Karnak, L. R. 2 A. & E. 289; Id., 2 P. C. 505.

[6] Charles Carter, 4 Cranch, 328, 2 L. Ed. 636.

[7] Omer, 2 Hughes, 96, Fed. Cas. No. 10,510.

[8] 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469. The following cases are interesting and typical: Virgin, 8 Pet. 554, 8 L. Ed. 1036; GRAPESHOT, 9 Wall. 129, 19 L. Ed. 651.

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sustain a respondentia bond than to sustain a bottomry.[9] In other respects the law as to the two is similar. Admiralty courts have cognizance of suits to enforce these bonds.[10]

SUPPLIES, REPAIRS, AND OTHER NECESSARIES

45. The lien of materialmen for supplies and repairs or other necessaries is an instance of implied hypothecation, similar to the bottomry lien for moneys advanced with the same object, the latter being an express hypothecation.

46. "MATERIALMAN" DEFINED—A materialman is one whose trade it is to repair or equip ships, or furnish them with tackle and necessary provisions.[11]

Under the general admiralty law as expounded by the Supreme Court, the materialman who furnished necessaries to a vessel in a foreign port on the order of her master was presumed to credit the vessel, though nothing was said on the subject; and he could therefore proceed against the vessel. The reason was the apparent necessity for credit in the absence of her owner, in order to enable the vessel to carry out the objects of her creation. As Mr. Justice Johnson expressed it in the St. Jago de Cuba,[12] it was to furnish wings and legs to the vessel to enable her to complete her voyage.

For the same reason, necessaries furnished a domestic vessel gave no claim against the vessel, but could be asserted simply against the owner; for in such case the necessity for the credit ceased, and the presumption would be that the credit was given to him.

§ 44. [9] JULIA BLAKE, 107 U. S. 418, 2 Sup. Ct. 692, 27 L. Ed. 595.

[10] Admiralty rule 18 (29 Sup. Ct. xl).

§§ 45–46. [11] Neptune, 3 Hagg. Ad. 142.

[12] 9 Wheat. 416, 6 L. Ed. 122.

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The distinction between these two classes was the result of an early decision of the court, from which it has never felt at liberty to depart.[13]

The opinion in that case was but a page in length and announced the distinction without any discussion or review of authorities.

In the Lottawanna[14] a vigorous attack was made upon it, but the court followed it in spite of the unanswerable dissenting opinion of Mr. Justice Clifford, which demonstrated that the distinction between foreign and domestic vessels had no place in the sources of the maritime law from which the grant of admiralty jurisdiction in our Constitution was drawn.

Soon after the organization of the Maritime Law Association, which includes many of the leading specialists in admiralty law, the subject of restoring the law by congressional action to its ancient uniformity in this respect was taken up, and a committee was appointed to draft such an act and submit it to the Association. It was before the Association for several years, was the subject of much consideration, and was redrafted many times, during which the committee underwent many changes. At last it assumed a shape which was acceptable to the Association, and Congress gave it the force of law by Act June 23, 1910.[15]

The act is as follows:

"An Act Relating to Liens on Vessels for Repairs, Supplies, or Other Necessaries.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that

[13] General Smith, 4 Wheat. 438, 4 L. Ed. 609 (1819).

[14] 21 Wall. 558, 22 L. Ed. 654 (1874).

[15] 36 Stat. 604 (U. S. Comp. St. §§ 7783–7787). The Committee of the Association which gave the act its final shape was composed of Mr. Frederic Dodge, of Boston, Mr. FitzHenry Smith, Jr., of Boston, and the author. Mr. Dodge has since been elevated to the bench.

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any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to prove that credit was given to the vessel.

"Sec. 2. That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

"Sec. 3. That the officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

"Sec. 4. That nothing in this act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.

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"Sec. 5. That this act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries."

The purpose of the act was to abolish the artificial distinction between foreign and domestic vessels as to the presumption of credit. In other respects it is substantially a reaffirmation of previous law. It renders obsolete many decisions turning upon the prior law as to the presumption of credit. But it cannot be understood without some knowledge of previous law, and of course is subject to repeal at any time; so that it is necessary to give some attention to the previous law, taking care to point out how it has been affected by the act.

It is proper to consider, then: (1) Necessaries furnished in foreign ports; (2) necessaries furnished in domestic ports.

SAME—NECESSARIES FURNISHED IN FOREIGN PORTS

47. For supplies furnished a foreign vessel on the order of the master in the absence of the owner the law implied a lien. But prior to the act the presumption was against a lien if ordered by the owner or by the master when the owner was in the port.

As the master in a proper case could bind the vessel for such necessaries by means of a bottomry bond, so he could contract direct with the materialmen. By so using his ship as a basis of credit, he saved the marine interest usually charged in such bonds. The test of his power was the needs of his vessel. He could not do this unless the necessity was shown for the supplies or repairs, but when that was shown the rest was presumed. The materialman could then assume from the necessity of the repairs, and the fact

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that the master ordered them, that a necessity existed for the credit, though in point of fact the master had funds which he might have used. Only knowledge of this fact or willful shutting of the eyes to avoid knowledge would defeat the materialman's claim.[16]

As the basis of this implied hypothecation was the power of the master as agent of the owner in the latter's absence, the presence of the owner defeated the master's implied power, and in such case the presumption in the absence of other evidence of intent was that credit was given to the owner.[17]

But in such case the owner himself could bind the vessel by agreeing that the materialman might look to the vessel; and, indeed, if it appeared that the owner had no credit or was embarrassed or insolvent, the presumption would be that the credit was given to the vessel, and not to him.[18]

The fact that the supplies are charged to the vessel by name on the creditor's books was regarded as evidence of an intent to credit the vessel, though not very strong evidence, as such entries are self-serving.[19]

But these distinctions are wiped out by the first section of the act, which gives a maritime lien on the furnishing of the service, regardless of the question as to whom credit was given.[20]

The second section of the act enumerates the persons who are presumed to have authority to bind the ship; that

§ 47. [16] KALORAMA, 10 Wall. 204, 19 L. Ed. 944; Underwriter (D. C.) 119 Fed. 713 (an invaluable opinion by Judge Lowell discussing the history and development of the doctrine).

[17] VALENCIA, 165 U. S. 270, 271, 17 Sup. Ct. 323, 41 L. Ed. 710; Reed Bros. Dredge No. 1 (D. C.) 135 Fed. 867.

[18] KALORAMA, 10 Wall. 204, 19 L. Ed. 944; Patapsco, 13 Wall. 329, 20 L. Ed. 696; Worthington, 133 Fed. 725, 66 C. C. A. 555, 70 L. R. A. 353.

[19] Mary Bell, 1 Sawy. 135, Fed. Cas. No. 9,199; Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385; Ella (D. C.) 84 Fed. 471.

[20] City of Milford (D. C.) 199 Fed. 956 (an excellent discussion of the purpose of the act by Judge Rose).

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is, those who may be supposed by third parties to be authorized to deal with them. This is not intended as exclusive. Others may have such power, either from previous course of dealing or other circumstances, such as are usually matters of proof when a question of agency is involved. But in the latter case the party who attempts to hold the ship must prove their authority, while as to those named in this section their authority is presumed.

The concluding sentence of the second section, denying the right of any one in tortious possession to bind the vessel was intended to settle a question as to which there had been some difference.[21]

Suppose the vessel is chartered—that is, hired by the owner to some one else to operate her—under an agreement that the charterer is to furnish all running supplies and the owner is to furnish the crew. In that case the materialman could not proceed against the vessel for such supplies furnished, even on the order of the master, if the materialman knew or could have ascertained that the charterer's power was so limited.[22] And this is true as to a vendee in possession under a sale, where the vendor retains title till payment. He could not bind the vessel under such circumstances.[23]

Even in case of chartered vessels, if the supplies were ordered in a foreign port by the master, the vessel would be bound, unless the materialman knew or could have ascertained the limitations of the charter party.[24]

[21] See the article by Mr. Frederic Cunningham on "Respondeat Superior in Admiralty," 19 Harvard Law Review, at page 446. See, also, Jackson v. Julia Smith, Fed. Cas. No. 7,136; Thurber v. Fannie, Fed. Cas. No. 14,014; Anne, Fed. Cas. No. 412 (Story, J.); G. H. Starbuck, Fed. Cas. No. 5,378; Dias v. Revenge, Fed. Cas. No. 3,877; Clarita, 23 Wall. 11, 23 L. Ed. 146.

[22] Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; VALENCIA, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

[23] H. C. Grady (D. C.) 87 Fed. 232.

[24] O. H. Vessels (D. C.) 177 Fed. 589; Id., 183 Fed. 561, 106 C. C. A. 107.

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The third section of the act substantially adopts the pre-existing law on the subject, except perhaps that it rather extends the powers of a purchaser in possession.

It does not impose upon the materialman the duty of inaugurating any inquiry or search of records. In the absence of anything to put him on inquiry, he may assume that the officers or agents usually empowered to act for ships have such powers.[25]

The existence of a charter party and knowledge of that fact by the materialman do not necessarily defeat the lien. The owner may estop himself to deny it by his conduct, or the charter party may not forbid the incurring of a lien.[26]

By "foreign port" was meant not simply ports of foreign countries, but in this respect the states also are foreign to each other. The character of the vessel is presumptively determined by her port of registry, so that, if a vessel registered in New York goes to Jersey City, she was in a foreign port for the purposes of this doctrine.[27]

This was only a presumption, and could be overcome by showing the real residence of the owner. Hence, if a vessel, though registered in New York, had an owner living in Norfolk, and the supply man knew this, or was put upon inquiry, supplies ordered in Norfolk would be treated as ordered in the home port. And this was true also as to a charterer operating a ship under a charter that amounted to a demise.[28]

[25] City of Milford (D. C.) 199 Fed. 956; Eureka (D. C.) 209 Fed. 373; Oceana (D. C.) 233 Fed. 139; Id., 244 Fed. 80, 156 C. C. A. 508.

[26] Mt. Desert, 158 Fed. 217; Id., 175 Fed. 747, 99 C. C. A. 323 (decided before the act); South Coast (D. C.) 233 Fed. 327; Id., 247 Fed. 84, 159 C. C. A. 302; Id., 251 U. S. —, 40 Sup. Ct. 233, 64 L. Ed. —; New York Trust Co. v. Bermuda-Atlantic S. S. Co. (D. C.) 211 Fed. 989.

[27] KALORAMA, 10 Wall. 210–212, 19 L. Ed. 944.

[28] Ellen Holgate (D. C.) 30 Fed. 125; Francis (D. C.) 21 Fed. 715; Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385.

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Under the act the distinction between foreign and domestic vessels has lost its importance.

These claims, being maritime in their nature, take precedence of common-law liens. Hence, though not required by any law to be recorded, they take precedence of a prior recorded mortgage, on the maritime theory that, being intended to keep the ship going, they are for the benefit of other liens, as tending to the preservation of the res.[29]

How Waived or Lost

Taking a note or acceptance for a claim of this sort is not a novation or waiver of the right to hold the vessel, unless so understood.[30]

Such a claim is lost under some circumstances by delay in enforcing it. In such cases it becomes "stale," to use the language of the admiralty judges. In its general principles the doctrine of staleness is substantially the same as the equitable doctrine of the same name. In its application admiralty is perhaps prompter in enforcing it.

As between the original parties, the claim would hold by analogy until a personal suit of the same nature would be barred by the act of limitations, in the absence of special circumstances, such as loss of evidence or changed condition of parties. But, where other interests have been acquired in ignorance of its existence, it would be held stale in a much shorter period, depending on the frequency of opportunities for enforcing it.[31]

Illustrations of such interests would be an innocent purchaser for value or a subsequent supply claim. A holder of

[29] Emily B. Souder, 17 Wall. 666, 21 L. Ed. 683; J. E. RUMBELL, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

[30] Emily B. Souder, 17 Wall. 666, 21 L. Ed. 683.

[31] SARAH ANN, 2 Sumn. 206, Fed. Cas. No. 12,342; Key City, 14 Wall. 653, 20 L. Ed. 896; Queen (D. C.) 78 Fed. 155; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419; Norfolk Sand & Cement Co. v. Owen, 115 Fed. 778, 53 C. C. A. 96, post p. 392.

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a mortgage to secure a subsequent debt is a purchaser for value, but not to secure an antecedent debt.[32] As against innocent purchasers, even as short a delay as three months in enforcement, where there was ample opportunity, has been held to render a claim stale.[33] In older days, when voyages were longer, they were often held stale after one voyage.[34] On the Lakes, the limit, in the absence of special circumstances, is one season of navigation.[35] In short, the time varies according to the opportunity of enforcement, the change in the situation of the parties, and the hardship occasioned or avoided by enforcing it or denying it.[36] The supply man acquires his right against the vessel, not only by furnishing necessaries in his own port, but by shipping them to the vessel in another port.[37]

Necessaries are not "furnished" to a vessel, unless that particular vessel is in the mind of the parties. Though it may not be necessary to show that they were actually used upon her, an indiscriminate furnishing of necessaries to the owner of a fleet does not give an indiscriminate lien upon the fleet, regardless of the manner in which the necessaries were applied.[38]

[32] CHUSAN, 2 Story, 455, Fed. Cas. No. 2,717; Ella (D. C.) 84 Fed. 471.

[33] Coburn v. Factors' & Traders' Ins. Co. (C. C.) 20 Fed. 644.

[34] General Jackson, 1 Spr. 554, Fed. Cas. No. 5,314.

[35] Hercules, 1 Spr. 534, Fed. Cas. No. 6,401; Nebraska, 69 Fed. 1009, 17 C. C. A. 94.

[36] Harriet Ann, 6 Biss. 13, Fed. Cas. No. 6,101; Eliza Jane, 1 Spr. 152, Fed. Cas. No. 4,363; CHUSAN, 2 Story, 455, Fed. Cas. No. 2,717; Thomas Sherlock (D. C.) 22 Fed. 253; Tiger (D. C.) 90 Fed. 826.

[37] Marion S. Harris, 85 Fed. 798, 29 C. C. A. 428; Yankee, 233 Fed. 919, 147 C. C. A. 593.

[38] James H. Prentice (D. C.) 36 Fed. 777 (decided before the act); Aitcheson v. Endless Chain Dredge (D. C.) 40 Fed. 253 (decided before the act); Astor Trust Co. v. E. V. White & Co., 241 Fed. 57, 154 C. C. A. 57, L. R. A. 1917E, 526; Cora P. White (D. C.) 243 Fed. 246; Walter Adams, 253 Fed. 20, 165 C. C. A. 40.

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Advances

Not only the supply man can proceed against the vessel, but any one who advances money on the credit of the vessel, express or implied, for the purpose of paying for such necessaries, has a claim against the vessel. In other words, advances of money under such circumstances are necessaries.[39] But money lent to the master or owner without reference to the ship, or money advanced to pay off claims not maritime, cannot be collected by suit against the vessel.[40]

The fourth section of the act specifically provides that it shall not be construed to "affect the rules of law now existing * * * in regard to the right to proceed against a vessel for advances."[41]

SAME—"NECESSARIES" DEFINED

48. "Necessaries," in this connection, mean whatever is fit and proper for the service on which a vessel is engaged. Whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term, as applied to those repairs done or things provided for the ship by order of the master, or other legal representative of the owner.

Care must be taken to consider the meaning of the term "necessaries," as used in connection with this doctrine of supplies and repairs. In a broad sense of the word, anything is necessary for the ship which tends to facilitate her use as a ship or to save her from danger. In that sense

[39] Emily B. Souder, 17 Wall. 666, 21 L. Ed. 683; Guiding Star (C. C.) 18 Fed. 263; Worthington, 133 Fed. 725, 66 C. C. A. 555, 70 L. R. A. 353.

[40] A. R. Dunlap, 1 Low. 350, Fed. Cas. No. 513.

[41] In view of this language in the act, the statement in the Cimbria (D. C.) 214 Fed. at page 129 is a little hard to understand.

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seaman's wages, towage, salvage, and many other things which come under the admiralty jurisdiction would be necessary. But a thing may be necessary without being a necessary. The former is not the meaning when used in connection with supplies and repairs. If it were, then, as necessaries furnished a domestic vessel were prior to the Act the basis of a lien against a vessel only when a state statute gave it, that would have put it in the power of a state legislature to modify some of the most ancient grounds of jurisdiction in admiralty. In the sense in which the word is now being used, it is associated with supplies and repairs, and it means such things of that general nature as are fit and proper for the use of the ship. It is not used in as strong a sense as its colloquial meaning would imply. It does not mean essential, but fit and proper. Whatever is fit and proper for the use of a vessel as a profitable investment, and would have been ordered by a prudent owner if present, comes within the term.[42]

For reasons given above, salvage is not a necessary in this sense, but an independent ground of admiralty lien, though repairs connected therewith may be. The act uses the word in its former sense, and was not intended to change it.[43]

The same is true as to towage.[44]

It has been held, also, that the services of a contracting stevedore in furnishing men to load or discharge a ship are necessaries.[45]

§ 48. [42] GRAPESHOT, 9 Wall. 129, 19 L. Ed. 651; J. Doherty (D. C.) 207 Fed. 997.

[43] Convoy (D. C.) 257 Fed. 843.

[44] J. Doherty (D. C.) 207 Fed. 997; Hatteras, 255 Fed. 518, 166 C. C. A. 586.

[45] Rupert City (D. C.) 213 Fed. 263. This seems to the author a stretch of the doctrine. The services of a stevedore who works manually are more like those of a seaman; and an attempt to draw a distinction between the man who works and the man who superintends is indulging in mere refinement. But some courts have drawn it. See post, p. 121.

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The definition given in the black-letter heading is that of Lord Tenterden in Webster v. Seekamp.[46] It is adopted by Sir Robert Phillimore in the Riga,[47] a leading case on the subject. It is defined by Judge Dyer to mean "those things which pertain to the navigation of the vessel, and which are practically incidental to, and connected with, her navigation." [48]

It is wider in its meaning than when used by the common-law courts in reference to the contracts of infants. For instance, supplies to the restaurant of a passenger steamer have been allowed.[49] And Judge Benedict has carried the principle so far as to hold that liquor furnished to the bar of a passenger steamer comes under the same head, as "supplying the ordinary wants of the class of passengers transported on the boat." [50] It includes muskets or arms to protect a vessel from pirates.[51] It has been held to include provisions, money, rope, life-preservers, chronometers, and nets and other equipment for a fishing vessel.[52]

This doctrine is analogous to the remedy given by section 6438 of the Virginia Code to those who furnish supplies to corporations. In Fosdick v. Schall,[53] the Supreme Court had decided that men who furnished supplies to a railroad necessary to keep it going had an equitable charge on the income prior to a previous mortgage, thus overturning common-law ideas, and ingrafting an admiralty prin-

[46] 4 Barn. & Ald. 352.

[47] L. R. 3 A. & E. 516.

[48] Hubbard v. Roach (C. C.) 9 Biss. 375, 2 Fed. 393.

[49] Plymouth Rock, 13 Blatchf. 505, Fed. Cas. No. 11,237.

[50] Long Branch, 9 Ben. 89, Fed. Cas. No. 8,484; Mayflower (D. C.) 39 Fed. 42; compare Sterling (D. C.) 230 Fed. 543.

[51] Weaver v. S. G. Owens, 1 Wall. Jr. 359, Fed. Cas. No. 17,310.

[52] Ellen Holgate (D. C.) 30 Fed. 125; Ludgate Hill (D. C.) 21 Fed. 431; Belle of the Coast, 72 Fed. 1019, 19 C. C. A. 345; Georgia (D. C.) 32 Fed. 637; Hiram R. Dixon (D. C.) 33 Fed. 297; Geisha (D. C.) 200 Fed. 865; Fortuna (D. C.) 213 Fed. 284.

[53] 99 U. S. 235, 25 L. Ed. 339.

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ciple upon chancery law. Section 6438 of the Code and similar statutes of other states have adopted it as a part of our statute law.

SAME—NECESSARIES FURNISHED DOMESTIC VESSELS

49. For supplies or other necessaries furnished a domestic vessel there was prior to the Act of June 23, 1910, no implied lien unless there was a local statute giving it.

As in such cases the owner is accessible, the reason for giving the master power to bind the vessel ceases, and hence the court decided early in its history that in case of supplies to domestic vessels the credit was presumptively given to the owner, and not to the vessel.[54]

Validity of State Statutes Giving Such Liens

In the course of the opinion the court intimated that if a state statute gave a right against the vessel in such cases they might enforce it. Acting upon the hint, many states passed acts giving rights of action in rem against domestic vessels, and even authorized their own courts to enforce them.

The Judiciary Act of 1789 provided that the admiralty jurisdiction of the federal courts should be exclusive, and conferred this jurisdiction in the first instance on the District Courts, but added a clause saving to the common-law courts all remedies which the common law was competent to give. Hence the courts had to decide that those state enactments which purported to bestow on their courts jurisdiction in rem to enforce a maritime right were unconstitutional. This principle, however, only applied to proceedings in rem pure and simple. For instance, an act which gave seamen a right to sue the owner for their wag-

§ 49. [54] GENERAL SMITH, 4 Wheat. 443, 4 L. Ed. 609.

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es in a state court was held not a proceeding in rem, though accompanied by an attachment; for it was still against the owner by name, not against the vessel by name, and the attachment was only an incident.[55] On the other hand, a statute authorizing a proceeding in rem directly against the vessel, in which any notice to the owners was only an incident, and only given if known, was held unconstitutional.[56]

But, though the courts decided that state legislation could not confer on state courts the right to enforce an admiralty claim against a vessel by pure proceedings in rem, they also decided that, as it was in its nature a maritime cause of action, the United States courts could enforce it. In other words, the effect of these decisions was that a state statute could create a right to proceed in rem on a maritime cause of action where none had previously existed, and that the federal courts, finding such a maritime right in existence, no matter how it arose, would enforce it.

It is analogous to the principle that an admiralty court will enforce a lien given by a foreign law, though, if the cause of action had arisen in the jurisdiction of the forum, no lien would have been created.[57]

The power of state statutes to affect admiralty jurisdiction has been greatly restricted by some late decisions of the Supreme Court. In Southern Pacific Co. v. Jensen it was held that the Workmen's Compensation Law of New York did not and could not take away the right of an employé injured on waters within the jurisdiction of the admiralty to pursue the remedies given him by admiralty law. The court says:

[55] Garcia y Leon v. Galceran, 11 Wall. 185, 20 L. Ed. 74; Rounds v. Cloverport Foundry & Machine Co., 237 U. S. 303, 35 Sup. Ct. 596, 59 L. Ed. 966.

[56] Glide, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296.

[57] Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772; Havana, 1 Spr. 402, Fed. Cas. No. 6,226.

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"No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." [58]

In Union Fish Co. v. Erickson[59] it was held that the contract of the captain of a ship is maritime, and could not be rendered void by a state statute of frauds requiring contracts to be in writing that were not to be performed within a year.

The Twelfth Admiralty Rule

By the act of August 23, 1842 (5 Stat. 516), Congress conferred upon the Supreme Court power to prescribe the forms and modes of process and proceeding and the practice generally in equity and admiralty for the federal courts of original jurisdiction. Acting under this authority, the court at December term, 1844, promulgated the admiralty rules.

The twelfth of these rules provided: "In all suits by materialmen for supplies or repairs, or other necessaries, for a foreign ship, or for a ship in a foreign port, the libelant may proceed against the ship and freight in rem, or against the master or owner alone in personam. And the like proceeding in rem shall apply to cases of domestic ships, where, by the local law, a lien is given to materialmen for supplies, repairs or other necessaries."

This was a mere affirmation of the then existing practice. It remained in this form until 1859, when the court, impressed by the diversity in the state statutes which it had

[58] 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. See, also, Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; Corsica Transit Co. v. W. S. Moore Grain Co., 253 Fed. 689, 165 C. C. A. 283; Western Fuel Co. v. Garcia (C. C. A.) 255 Fed. 817.

[59] 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261.

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undertaken to recognize, amended it so as to read as follows: "In all suits by materialmen for supplies, or repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libelant may proceed against the ship and freight in rem, or against the master or owner alone in personam. And the like proceeding in personam, but not in rem, shall apply to cases of domestic ships, for supplies, repairs, or other necessaries."

The effect of this was to take away the right to proceed in rem for necessaries furnished to domestic vessels, though given by a state statute. And in the St. Lawrence,[60] decided soon afterwards, Chief Justice Taney justified this action by saying that the question whether a creditor should proceed in rem or in personam to enforce a maritime right was a question of procedure, which the court might allow or abolish at its pleasure.

This rule remained in this form till May 6, 1872, when the court again amended it so as to read as follows: "In all suits by materialmen for supplies or repairs or other necessaries, the libelant may proceed against the ship and freight in rem, or against the master or owner alone in personam." The effect of this was to give exactly the same procedure in the case of domestic and foreign vessels.

It does not mention the existence of a state statute as requisite to the enforcement of a lien against a domestic vessel. If, as Justice Taney says, it is a mere question of procedure which the court can give or take away at will, it is difficult to see why the language of this rule did not give the right independent of state statutes, though the decisions have settled that prior to the act of June 23, 1910, in case of domestic vessels it was only enforced when given by a state statute. But, in the great case of the LOTTAWANNA,[61] Mr. Justice Bradley said that a right to proceed in rem was not a mere right of procedure, but a

[60] 1 Black, 522, 17 L. Ed. 180.
[61] 21 Wall. 558, 22 L. Ed. 654.

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right of property which the court by rule could not give or take away, and that the amendment of 1872 was not intended to give any lien, but merely to remove all impediments in enforcing such as already existed. This being so, the kaleidoscopic changes of the twelfth rule only created confusion. Prior to its enactment in 1844, the right given by state statutes had been enforced, and now, irrespective of the act of June 23, 1910, the rule, as construed by its makers, creates no new right, but merely removes impediments in enforcing a right already existing.

The fact is that the whole doctrine is unsatisfactory and illogical in its development. Its difficulties commenced when the court, following the narrow views of the English law, denied that any right of procedure in rem for necessaries existed in the case of domestic vessels. Any one who reads the dissenting opinion of Mr. Justice Clifford in the LOTTAWANNA CASE will be convinced that by the general principles of maritime law there was no distinction between foreign and domestic vessels, and that it would have saved much confusion and litigation if the court had promptly come out and corrected its error, as it did on the tide-water question.

It has been corrected at last by the act of June 23, 1910, but it took an act of Congress to do it.

Mr. Justice Bradley, in the majority opinion of that same case, is forced to say that this idea of a state giving an additional remedy to an admiralty contract and of a federal court recognizing and enforcing it is anomalous. He attributes it to the fact that the state admiralty courts prior to the Constitution recognized and enforced it, and that the new federal judges, many of whom had been state judges, continued the same jurisdiction, without recognizing their altered relations.

Perhaps a stronger reason is that state statutes only incidentally affecting commerce, like pilotage laws, quarantine laws, and laws authorizing bridges over navigable

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streams, have been upheld as valid in the absence of legislation by Congress, and that these statutes belong to the same category.[62]

At the same time it must be remembered that the admiralty jurisdiction is not dependent upon the commerce clause of the Constitution, but is derived from an entirely different one.[63]

The history and changes of the twelfth admiralty rule may be traced in the cases stated in the footnote.[64]

In general, this right against domestic vessels was governed by the principles which apply in case of foreign vessels. It is prior to nonmaritime liens; it is not waived by taking a note; it becomes stale usually in less time than in case of foreign vessels, as it is more easily enforceable; it is given for advances, and for things not merely necessary, but fit and proper.

SAME—DOMESTIC LIENS AS AFFECTED BY OWNER'S PRESENCE

50. Prior to the act of June 23, 1910, the owner's presence rebutted the presumption of credit to the ship in the case of domestic as well as foreign vessels, but the act abolishes this doctrine, so that the furnishing of necessaries to a domestic vessel gives the lien just as in the case of a foreign vessel.

Prior to the act there were some decisions holding that under the general terms of state statutes the mere furnishing of the service gave a lien on domestic vessels, though

[62] 21 Wall. 581, 582, 22 L. Ed. 664.

[63] Const. art. 3, § 2; EX PARTE GARNETT, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631.

[64] GENERAL SMITH, 4 Wheat. 443; 4 L. Ed. 609; St. Lawrence, 1 Black, 522, 17 L. Ed. 180; Circassian, Fed. Cas. No. 2,720a; LOTTAWANNA, 21 Wall. 558, 22 L. Ed. 654; J. E. RUMBELL, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

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the owner was present, and independent of any understanding to that effect.[65]

But the better opinion was that the presence of the owner rebutted the presumption of credit—and hence of a maritime lien—in the case of domestic vessels also.[66]

SAME—SHIPBUILDING CONTRACTS

51. A contract for building a ship is not maritime, and hence cannot be enforced in the admiralty, nor can it be made so by a state statute. Such a statute, however, can give a remedy to the state courts for its enforcement.

The theory on which these state liens were enforced was that they were maritime in their nature. But a state cannot make a contract maritime which is not in its nature maritime, nor attach a maritime lien to a nonmaritime cause of action. For this reason a state statute cannot create a right to proceed in the admiralty to enforce a contract for building a ship, as the courts have held these contracts not marine in their nature. This was first decided by the Supreme Court in People's Ferry Co. of Boston v. Beers.[67] The ground of the decision is that such contracts have no reference to any voyage, that the vessel is then neither registered nor licensed as a seagoing ship, that it is a contract made on land to be performed on land, and therefore nonmaritime.

This decision was during a period when the Supreme Court was leaning against the extension of admiralty juris-

[65] Alvira (D. C.) 63 Fed. 144; McRae v. Bowers Dredging Co. (C. C.) 86 Fed. 344; Iris, 100 Fed. 104, 40 C. C. A. 301.

[66] Guiding Star (C. C.) 18 Fed. 263; Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385; Electron, 74 Fed. 689, 21 C. C. A. 12; Mack S. S. Co. v. Thompson, 176 Fed. 499, 100 C. C. A. 57; Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512.

§ 51. [67] 20 How. 393, 15 L. Ed. 961.

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diction. It has long repudiated any dependence on the commerce clause for admiralty jurisdiction.[68] And the argument that it was made on land, to be performed on land, recalls the most bigoted period of English common-law jealousy. It is a test no longer insisted on; for it would debar from the admiralty courts all coppering, painting, or calking on marine railways or in dry docks, and even salvage contracts to float a stranded vessel.

A shipbuilding contract is not entirely to be performed on land. When a ship first floats upon her destined element, she is a hulk. Her masts, her sails, her anchors, and general outfit are all added after she is afloat. It might as well be said that a bill of lading signed in an agent's office, and representing cotton alongside a ship in the sheds subject to her order, is a contract made on land, to be performed on land. Under the general maritime law, shipbuilding contracts were maritime.[69]

But, however it may be on principle, the law is settled that such contracts are not maritime in their character.[70] This being so, it necessarily followed that a state statute could not make them maritime, and so the court soon held.[71]

As the limitation upon these statutes is simply that they shall not interfere with the exclusive jurisdiction of the admiralty, it follows that any lien or special process given to enforce any nonmaritime right is valid; and therefore the Supreme Court has upheld a special remedy conferred by a state statute upon a state court to enforce a shipbuilding contract, for the very reason that it is not maritime.[72]

[68] EX PARTE GARNETT, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631.

[69] Ben. Adm. § 264.

[70] North Pac. S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U. S. 119, 39 Sup. Ct. 221, 63 L. Ed. 510; United Shores (D. C.) 193 Fed. 552.

[71] Roach v. Chapman, 22 How. 129, 16 L. Ed. 294.

[72] Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Iroquois Transp.

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SAME—VESSELS AFFECTED BY STATE STATUTES

52. The better opinion is that state statutes created this lien only on domestic vessels, and that the rights of material men against foreign vessels depended upon the general maritime law.

As stated above, the distinction between supplies furnished to domestic vessels and to foreign vessels is largely artificial, and it is to be regretted that it was ever made. The symmetry of marine law requires that the general doctrine be modified as little as possible. If state statutes can regulate not only claims against domestic vessels, but against foreign vessels, they can add liens to maritime causes of action that did not exist before, and take them away where they did exist. Consequently, a foreign vessel would find a different law in every port. It is more consistent with principle to hold, as is historically true, that the sole purpose and object of these state laws were to put domestic vessels on the same footing as foreign vessels. The converse of this, that they can reduce foreign vessels to the basis of domestic vessels, would be a great anomaly. Accordingly, the best-considered decisions have held that the maritime rights of foreign vessels are independent of these state statutes (as an attempt to regulate them would be to interfere with the general admiralty jurisdiction), and that these statutes regulated only rights against domestic vessels.[78]

For this reason the fifth section of the act of June 23, 1910, provided that it should supersede all state statutes on the subject.

Co. v. Delaney Forge & Iron Co., 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836.

[78] CHUSAN, 2 Story, 455, Fed. Cas. No. 2,717; Lyndhurst (D. C.) 48 Fed. 839; Electron, 74 Fed. 689, 21 C. C. A. 12; Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770; Corsica Transit Co. v. W. S. Moore Grain Co., 253 Fed. 689, 165 C. C. A. 283.

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CHAPTER V

OF STEVEDORES' CONTRACTS, CANAL TOLLS, AND TOWAGE CONTRACTS

53. Stevedores' Contracts—"Stevedore" Defined.
54. Maritime Character of Contracts, and Liens on Foreign and Domestic Vessels.
55. Privity of Contract Necessary to Lien.
56. Canal Tolls.
57. Towage—"Service" Defined.
58, 59. Responsibility as between Tug and Tow.
60. Degree of Care Required of Tug.
61. For Whose Acts Tug or Tow Liable.

STEVEDORES' CONTRACTS—"STEVEDORE" DEFINED

53. A stevedore is a workman or contractor who loads or discharges a ship and properly stows her cargo.

SAME—MARITIME CHARACTER OF CONTRACTS, AND LIENS ON FOREIGN AND DOMESTIC VESSELS

54. A contract for such service is maritime, and gives a maritime lien.

The services of a stevedore are essential to the financial success of a ship. The modern ship is intricate and complicated in her cargo spaces, and it requires the skill of an expert to load her to advantage. He must not only know how best to stow the cargo without loss of space, but also how to arrange it so as to trim her properly, putting the heavy nearest the bottom so as not to make her crank; and he must work with rapidity, for the daily demurrage of vessels amounts to a large sum, and every delay means heavy

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loss. In view of the narrow margin on which business is conducted nowadays, the proper stowage of the cargo makes all the difference between a profit and a loss.

In view of the importance of these services, it is surprising that its maritime character could ever have been questioned, yet until recently the preponderance of authority was against it. The probable explanation is that, when vessels were small, no great skill was required, and the loading was mainly done by the crew themselves.

In the Amstel,[1] Judge Betts denied the maritime character of the service on the ground that it was partly to be performed on land, and was no more connected with the good of the vessel than a man who hauls goods to the wharf, and many cases follow this decision without question.

But it has been seen that in matters of contract the test is the character of the service, and not its locality. Accordingly, in the GEORGE T. KEMP,[2] Judge Lowell held that such services were maritime, and gave the stevedore a right to hold the vessel itself, at least if she was a foreign vessel, and this has been followed in many later cases.[3]

Some of these cases hold that, although the service is maritime, the stevedore has his remedy in rem only against a foreign ship, or against a domestic ship where there is a state statute giving it. A typical case drawing this distinction is the Gilbert Knapp.[4] It is a good illustration of the confusion caused in marine law by the distinction drawn between foreign and domestic vessels in connection with

§§ 53–54. [1] 1 Blatchf. & H. 215, Fed. Cas. No. 339.

[2] Fed. Cas. No. 5,341.

[3] Luckenbach v. Pearce, 212 Fed. 388, 129 C. C. A. 64; Rupert City (D. C.) 213 Fed. 263; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. This last case was a suit by a stevedore for personal injuries, not a suit to enforce a lien for services rendered. It decided that such service is maritime in character, from which the right to proceed in rem ought to follow as a corollary.

[4] (D. C.) 37 Fed. 209.

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the doctrine of the rights of material men. The cases which hold that a stevedore has no lien upon a domestic vessel compare his work and character to that of a material man and follow those analogies. Most of these cases, when examined, will appear to be cases where the vessel actually was a foreign vessel, and where this qualification was put in by the judge, not as a decision, but as a cautious reservation which might protect him in future.[5]

But the better opinion is that a stevedore is more like a sailor than a material man. The duties now performed by him under modern demands are the same as those that sailors used to perform. No one has ever supposed that a sailor had no lien on a vessel unless given by a state statute, and this distinction should not be drawn against a stevedore. Accordingly, in the SEGURANCA,[6] Judge Brown reviews this question, holds that a stevedore is more like a sailor than he is like a material man, and decides that he ought to have a lien even in the home port, just as a sailor would have.

But, while the individual workman is like a sailor in his rights when he contracts directly with the ship, the above and other cases draw a distinction between his rights and those of a contracting stevedore who employs laborers and does not work himself. He is held to resemble a material man and his service is on that footing. Hence, in the absence of statute, he would not on this theory have a lien on a domestic vessel.[7]

The question is not important since the act of June 23, 1910,[8] abolishing the distinction between domestic and foreign vessels as to the presumption of credit if his service is correctly classed as a necessary. If not a lien independent of the act, it would be by virtue of it.

[5] Main, 51 Fed. 954, 2 C. C. A. 569; Norwegian S. S. Co. v. Washington, 57 Fed. 224, 6 C. C. A. 313; Scotia (D. C.) 35 Fed. 916.

[6] (D. C.) 58 Fed. 908.

[7] Rupert City (D. C.) 213 Fed. 263; ante, p. 108.

[8] 36 Stat. 604 (U. S. Comp. St. §§ 7783–7787).

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SAME—PRIVITY OF CONTRACT NECESSARY TO LIEN

55. This being a lien arising from contract, only those are entitled to it who have a contract with the vessel.

It is not like a subcontractor's lien under a state mechanic's lien law. Hence, if a vessel employs a stevedore to load her, he would have a lien, but the workmen employed by him would not, for their contract would be with him, and not with the vessel. So if a vessel comes under a charter party, by which the charterer is to load her and pay a lump sum for her use, it is no interest of the vessel whether the charterer loads her or not. If he does not, he will have to pay the charter price for her use just the same, and no loss would be entailed upon the vessel, as she would get dead freight. In such case, the charterer would be an independent contractor, and, if he employs a stevedore, the latter would have no contract with the vessel itself, and would have to look to him. On principle, this doctrine is clear. The only confusion which has arisen under it at all is that frequently the charterer is not only charterer, but agent of the vessel, having authority from the vessel. If the stevedore deals with him in that capacity, and does not know the limitations of his power, or is not so put upon inquiry as to charge him with knowledge, it may sometimes be the case that the vessel will be bound, but the natural presumption would be the other way.[9]

The relation between the stevedore and ship is but a branch of the general law of master and servant, and is foreign to the present subject. He is so far the agent of the ship as to bind the ship by his acts, even when the charter

[9] That a contract with the vessel must be shown, see Hattie M. Bain (D. C.) 20 Fed. 389; Mark Lane (D. C.) 13 Fed. 800; Chicklade (D. C.) 120 Fed. 1003.

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party expressly requires the ship to employ the charterer's stevedore, as is frequently the case.[10]

CANAL TOLLS

56. Tolls due by a vessel for use of a canal are a maritime contract, and can be enforced by a libel in rem in admiralty.

In the St. Joseph,[11] a corporation was authorized by its charter to improve a navigable stream and charge for the use of the same, and the charter, which was a public one granted by act of the Legislature, made these tolls a lien in rem upon the vessel. The court held that the contract was maritime, and could be enforced in admiralty against the vessel.

In the Bob Connell,[12] the court held that a service of this sort was maritime, likened it to the lien of a material man, and held that it could be enforced against a domestic vessel if there was a state statute, and not if there was no statute.

As these decisions treat it in the nature of a necessary, it follows that there is no difference between domestic and foreign vessels, but there would be a lien upon both under the act of June 23, 1910.[13]

[10] T. A. Goddard (D. C.) 12 Fed. 174; Brooks v. Hilton-Dodge Lumber Co., 229 Fed. 708, 144 C. C. A. 118.

§ 56. [11] Fed. Cas. No. 12,230.

[12] (C. C.) 1 Fed. 218.

[13] 36 Stat. 604 (U. S. Comp. St. §§ 7783–7787).

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TOWAGE—"SERVICE" DEFINED

57. Towage is a service rendered in the propulsion of uninjured vessels under ordinary circumstances of navigation, irrespective of any unusual peril.

This has become a topic of steadily increasing importance. The saving of time and diminution of risk accomplished by the use of tugboats has caused every harbor to be thronged with them, from the wheezing little high-pressure boat that pulls watermelon sloops and oyster pungies, to the magnificent ocean-going triple expansion tugs, equipped with machinery, bitts, and hawsers strong enough to tow a fleet. Their services are not limited to towing sail vessels, but in contracted harbors the long, narrow modern steamers, in turning or docking, do not disdain their aid.

It is often hard to draw the line between a towage and a salvage service. When a tug is taken by a sound vessel, as a mere means of saving time or from considerations of convenience, the service would be classed as towage, while if the vessel is disabled and in need of assistance, to escape actual or possible risk the service is a salvage service, of a high or low merit according to circumstances.[14]

Indeed, a service may start as towage and end as salvage. For instance, a tug starts to tow a vessel from one point to another under contract for a certain sum. The towage contract is presumed to cover only the ordinary incidents of the voyage. If a tempest arises of sufficient severity to greatly endanger or to disable the tow, the towage contract is abrogated by the vis major, and the tug may claim

[14] Reward, 1 W. Rob. 174; Princess Alice, 3 W. Rob. 138; Emily B. Souder, 15 Blatch. 185; Fed. Cas. No. 4,458; J. C. Pfluger (D. C.) 109 Fed. 93; Lowther Castle (D. C.) 195 Fed. 604. Though the vessel may be partially disabled, the service would still be towage, if she was in no risk. Robert S. Besnard (D. C.) 144 Fed. 992; Joseph F. Clinton, 250 Fed. 977, 163 C. C. A. 227.

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salvage, provided she has not been negligent in unnecessarily exposing her tow, or bringing about the dangerous situation.[15]

SAME—RESPONSIBILITY AS BETWEEN TUG AND TOW

58. The tow is not liable for the tug's acts where the latter directs the navigation.

59. It is liable for its own negligence, and may be for the tug's, where it directs the navigation.

The relation between tug and tow, under the American decisions, under ordinary circumstances, is that of independent contractor, not that of principal and agent. The tug is not the servant or employé of the tow, and therefore the tow is not responsible for the acts of the tug. Hence, if the tow collide with some vessel during the voyage, it is not liable for the damage caused thereby, unless some negligence contributing to the collision is proved against the tow. The law is summarized in STURGIS v. BOYER,[16] where the court says: "Looking at all the facts and circumstances of the case, we think the libelants are clearly entitled to a decree in their favor; and the only remaining question of any importance is whether the ship and the steam tug are both liable for the consequences of the collision, or, if not, which of the two ought to be held responsible for the damage sustained by the libelants. Cases arise, undoubtedly, when both the tow and the tug are jointly lia-

[15] H. B. Foster, Fed. Cas. No. 6,290; Minnehaha, Lush. 335; Madras, [1898] P. 90; Harvest Home, [1904] P. 409; Id., [1905] P. 177.

§§ 58–59. [16] 24 How. 110, 16 L. Ed. 591. See, also, Clarita, 23 Wall. 1, 23 L. Ed. 146; Eugene F. Moran v. New York Cent. & H. R. R. Co., 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600; C. W. Mills (D. C.) 241 Fed. 204; Id., 241 Fed. 378, 154 C. C. A. 651; Cromwell (D. C.) 247 Fed. 207; Id. (C. C. A.) 259 Fed. 166; Violetta (D. C.) 141 Fed. 690; Id., 153 Fed. 1023, 82 C. C. A. 678.

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ble for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible, as when the tug is employed by the master or owner of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and, if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons, suffering damages through the fault of those in charge of the vessel, must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unsea-

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worthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf that a part, or even the whole, of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation. Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew, nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is in legal contemplation made with

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the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation."

The courts hold the relation between tug and tow to resemble that between the hirer and driver of a livery-stable carriage. The hirer merely designates the destination, and as the driver is not employed or selected by him, but by the livery-stable keeper, the hirer is not liable for his acts.[17]

But if the tow is the dominant mind, and the tug merely furnishes the motive power and acts under the tow's orders, the responsibility would be upon the tow, though the tug would be liable for its own negligence.[18]

The English courts are inclined to regard the tug as the servant of the tow, and to hold the tow liable for the tug's negligence.[19]

But the difference between the American and English decisions is more apparent than real. The statements of facts in the English cases show that it is the usual practice in England to have the master of the tow direct the navigation of both vessels. In such case, the negligence would be that of the tow rather than the tug; and so the English courts have settled upon the doctrine that the question whether the tug is the agent of the tow or an independent contractor is a question dependent upon the special circumstances of each case.[20]

The relative duties of tug and tow are explained in DUTTON v. THE EXPRESS.[21] If the tow is fastened along-

[17] Quarman v. Burnett, 6 M. & W. 499.

[18] In re Walsh, 136 Fed. 557, 69 C. C. A. 267; Degama, 150 Fed. 323, 80 C. C. A. 93.

[19] Niobe, 13 P. D. 55; Isca, 12 P. D. 34.

[20] Quickstep, 15 P. D. 196; America, L. R. 6 P. C. 127; Smith v. Towboat Co., L. R. 5 P. C. 308; Devonshire, [1912] A. C. 634. Note especially the discussion of the American and English decisions on the subject in Marsden on Collision (7th Ed.) 193 et seq.

[21] 3 Cliff. 462, Fed. Cas. No. 4,209.

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side the tug, and the tug has full charge of the navigation, then the liability for a collision would be upon the tug. If the tow is towing at the end of a hawser, the liability would be upon the tug if the tow steered properly, and would be upon the tow if the proximate cause of the collision was wild steering on her part. Even if she was steering properly, and the tug steered her into danger, she would be responsible to the injured vessel if by changing her helm or taking any other reasonable precautions she could avoid the consequences of the tug's negligence, for it would be her duty to avoid collision if she could do so. It is also the duty of the tow to arrange the hawser at her end.[22]

The tug is entitled to rely upon the statement of the tow as to the draft of the latter, and is not required to examine the tow's footmarks.[23]

SAME—DEGREE OF CARE REQUIRED OF TUG

60. A tugboat is not a common carrier, and is liable only for lack of ordinary care, as measured by prudent men of that profession.

There are some early decisions to the effect that a tug boat is a common carrier, but the later authorities have settled thoroughly that it is not, but only an ordinary bailee, liable for ordinary negligence. It is also settled that the occurrence of an accident raises no presumption against the tug, and that the burden is on the complaining party to prove a lack of ordinary care.[24] At the same time, the ordi-

[22] Isaac H. Tillyer (D. C.) 101 Fed. 478; America, 42 C. C. A. 617, 102 Fed. 767; Virginia Ehrman, 97 U. S. 309–315, 24 L. Ed. 890; Imperial (D. C.) 38 Fed. 614, 3 L. R. A. 234; Pederson v. Spreckles, 31 C. C. A. 308, 87 Fed. 938; Doris (D. C.) 108 Fed. 552; Maurice, 135 Fed. 516, 68 C. C. A. 228; C. W. Mills (D. C.) 241 Fed. 204; Id., 241 Fed. 378, 154 C. C. A. 651.

[23] Coney Island (D. C.) 115 Fed. 751; Royal (D. C.) 138 Fed. 416.

§ 60. [24] EASTERN TRANSP. LINE v. HOPE, 95 U. S. 297, 24 L.

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nary care required of those engaged in the profession of towing is a high one, for they hold themselves out as experts. The measure of care required is similar to that required of pilots. In fact, they are pilots.[25]

As an expert, a tugboat man must know the channel and its usual currents and dangers, and the proper method of making up tows. He is liable for striking upon obstructions or rocks in the channel which ought to be known to men experienced in its navigation, but not for those which are unknown.[26] He is required to have such knowledge of weather indications as experienced men of his class are supposed to have, though it would not be negligence in him to start to sea with his tow where the weather bureau predicted good weather. Nor would it be negligence to start on inland navigation merely because the weather bureau indicated storms at sea.[27]

A tugboat man who contracts to perform a service impliedly warrants that his tug is sufficiently equipped and efficient to perform the service, though he would not be liable for any breakdown arising from causes which ordinary care could not have discovered and prevented.[28]

Ed. 477; Atlantic City, 241 Fed. 62, 154 C. C. A. 62; Kunkle Bros. (D. C.) 211 Fed. 540.

[25] Margaret, 94 U. S. 494, 24 L. Ed. 146; Mount Hope, 29 C. C. A. 365, 84 Fed. 910; Syracuse (D. C.) 84 Fed. 1005; Somers N. Smith (D. C.) 120 Fed. 569; Consolidated Coal Co. v. Knickerbocker Steam Towage Co. (D. C.) 200 Fed. 840.

[26] Ashbourne (D. C.) 206 Fed. 861; Louisa (D. C.) 209 Fed. 1001; 215 Fed. 92, 131 C. C. A. 400; Mason, 249 Fed. 718, 161 C. C. A. 628; Westerly, 249 Fed. 938, 162 C. C. A. 136; Gray's Harbor Tugboat Co. v. Petersen, 250 Fed. 956, 163 C. C. A. 206.

[27] Victoria, 37 C. C. A. 40, 95 Fed. 184; William H. Yerkes, Jr. (D. C.) 214 Fed. 881; May McGuirl (D. C.) 215 Fed. 805; Salutation (D. C.) 239 Fed. 421.

[28] Undaunted, 11 P. D. 46; Ratata, [1898] A. C. 513; Charles B. Sandford, 204 Fed. 77, 122 C. C. A. 391; Enterprise (D. C.) 228 Fed. 131; Coleman v. Aiken, 242 Fed. 239, 155 C. C. A. 79.

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SAME—FOR WHOSE ACTS TUG OR TOW LIABLE

61. A tug and tow are liable, either in contract or in tort, only for the acts and defaults of those who are the lawful agents or representatives of their owners.

Hence, if a charterer employs a tug to tow his vessel and under the terms of the charter party he has no right to bind the vessel for such contracts and this is known to the party dealing with him, the vessel would not be liable for the tow bill. So, too, if the tug at the time is in the hands of parties who have no right to her use, she would not be liable in rem for torts committed or contracts made by them.[29]

A towage contract is pre-eminently maritime, and may be enforced against the tug or tow.[30]

The better opinion is that a towage service is not a necessary in the sense in which that word is used when the rights of material men are under consideration, and does not depend upon state or federal statutes for its existence, but is a distinct class of marine service.[31]

§ 61. [29] Mary A. Tryon (D. C.) 93 Fed. 220; Tasmania, 13 P. D. 110; Anne, 1 Mason, 508, Fed. Cas. No. 412; Clarita, 23 Wall. 11, 23 L. Ed. 146; J. Doherty (D. C.) 207 Fed. 997.

[30] Ward v. Banner, Fed. Cas. No. 17,149; Williams, 1 Brown, Adm. 208, Fed. Cas. No. 17,710; Erastina (D. C.) 50 Fed. 126; Knapp, Stout & Co. Company v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921; Holthe (D. C.) 249 Fed. 783; Energy, L. R. 3 A. & E. 48; International (C. C. A.) 256 Fed. 192 (failure of tug to come to aid of signaling vessel entitled to her services gives suit in personam, not in rem).

[31] J. Doherty (D. C.) 207 Fed. 997; Hatteras, 255 Fed. 518, 166 C. C. A. 586. Ante, p. 108.

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CHAPTER VI

OF SALVAGE

62. Nature and Grounds.
63. "Salvage" Defined—Elements of Service.
64. The Award—Amount in General.
65. Elements of Compensation and Bounty.
66. Incidents of the Service.
67. Salvage Contracts.
68. Salvage Apportionment.
69. Salvage Chargeable as between Ship and Cargo.

NATURE AND GROUNDS

62. Salvage is peculiarly maritime in its nature. It is awarded on grounds of public policy, and is independent of contract.

This is one of the most interesting branches of marine jurisprudence. It is more purely maritime in its nature than any heretofore discussed. It finds no analogy in the common law, nor, indeed, as far as procedure is concerned, in the chancery law, though it largely partakes of equitable principles in its administration. Both the common-law and chancery courts enforce rights of positive obligation arising either from contract or from a violation of some binding duty which one man owes to another in the organization of modern society. Duties of imperfect obligation appeal in vain to those courts.

But the right of salvage depends on no contract. A salvor who rescues valuable ships or cargoes from the grasp of wind and wave, the embrace of rocky ledges or the devouring flame, need prove no bargain with its owner as the basis of recovering a reward. He is paid by the courts from motives of public policy—paid not merely for the

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value of his time and labor in the special case, but a bounty in addition, so that he may be encouraged to do the like again.

In an early case Chief Justice Marshall contrasted the doctrines of the common-law and marine courts on the subject: "If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever, if valuable goods be rescued from a house in flames, at the imminent hazard of life, by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea, yet the claim for salvage could not perhaps be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice." [1] This same comparison is made in the interesting English case of Falcke v. Insurance Co.[2]

While salvage does not necessarily spring from contract, it may do so, and in fact usually does so; the most frequent instances to the contrary being services to derelicts. In modern times the greater use of steamers and better methods of construction render these cases rare, and make nearly all the cases with which we have to deal spring from contract. Hence salvage is classified in this treatise under contract rights, sacrificing logic to convenience.

These contracts, as in other branches of the law, may be express or implied. A service rendered to a distressed vessel with the acquiescence of those in charge implies an

§ 62. [1] Blaireau, 2 Cranch, 240, 2 L. Ed. 266.

[2] 34 Ch. D. 234. The origin and early history of the law of salvage may be found in Lord Hale's tract De Jure Maris (Hall on Seashore [2d Ed.] Appx. xxxvii), the essay of Mr. Mears on the Admiralty Jurisdiction reprinted in 2 Select Essays in Anglo-American Legal History, 831, note, and in Mr. Marsden's Introduction to 2 Select Pleas in Admiralty (published by the Selden Society) xxv et seq.

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agreement for payment therefor, though not a word is said about price.[3]

"SALVAGE" DEFINED—ELEMENTS OF SERVICE

63. Salvage is the reward allowed for a service rendered to marine property, at risk or in distress, by those under no obligation (independent of statute) to render it, which results in benefit to the property if eventually saved.

"A Service Rendered"

Space forbids the enumeration of all services that have been held by the courts to be included in these words. The following may be named rather as illustrations than as a catalogue:

(1) Towage of disabled vessels.[4]
(2) Piloting or navigating endangered ships to safety.[5]
(3) Removing persons or cargo from endangered vessel.[6]
(4) Saving a stranded ship and cargo.[7]
(5) Raising a sunken ship or cargo.[8]

[3] Gould v. U. S., 1 Ct. Cl. 184; Bryan v. U. S., 6 Ct. Cl. 128; Potomac Steamboat Co. v. Baker Salvage Co., 123 U. S. 40, 8 Sup. Ct. 33, 31 L. Ed. 75. Compare U. S. v. Cornell Steamboat Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. Ed. 987.

§ 63. [4] AKABA, 54 Fed. 197, 4 C. C. A. 281; Blake v. Baltimore & C. S. S. Co. of Baltimore City, 211 Fed. 116, 128 C. C. A. 577; Roanoke, 214 Fed. 63, 130 C. C. A. 503; Adelaide T. Carleton (D. C.) 215 Fed. 932; Antilla (D. C.) 245 Fed. 973.

[5] Anna, 6 Ben. 166, Fed. Cas. No. 398; Alamo, 75 Fed. 602, 21 C. C. A. 451; J. L. Bowen, 5 Ben. 296, Fed. Cas. No. 7,322.

[6] John Wesley, Fed. Cas. No. 7,433; Sir William Armstrong (D. C.) 53 Fed. 145.

[7] Sandringham (D. C.) 10 Fed. 556; Kimberley (D. C.) 40 Fed. 289; St. Charles (D. C.) 254 Fed. 509; Teresa Accama (D. C.) 254 Fed. 637; Kia Ora, 252 Fed. 507, 164 C. C. A. 423.

[8] Camanche, 8 Wall. 448, 19 L. Ed. 397; Eads v. H. D. Bacon, 1 Newb. 274, Fed. Cas. No. 4,232; Isaac Allerton, Fed. Cas. No. 7,088; Silver Star (D. C.) 207 Fed. 600.

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(6) Saving a derelict or wreck.[9]

(7) Taking aid to a distressed ship or information for her to port.[10]

(8) Saving people in boats of distressed ship.[11]

(9) Protecting ship, cargo, or persons aboard from pirates or wreckers.[12]

(10) Furnishing men or necessary supplies or appurtenances to a ship which is short of them.[13]

(11) Saving a ship, cargo, or persons aboard from fire either aboard or in dangerous proximity.[14]

(12) Standing by a distressed ship.[15]

(13) Removing a ship from an ice floe or any impending danger.[16]

"To Marine Property"

It is difficult to understand why the motives of public policy on which the law of salvage is based do not apply to the rescue of any property in danger on navigable waters, whether such property ever formed part of a vessel or cargo or not. If, for instance, a passenger on a train crossing a

[9] Janet Court, [1897] P. 59; Thomas W. Haven (D. C.) 48 Fed. 842; Fisher v. Sybil, 5 Hughes, 61, Fed. Cas. No. 4,824; Sprague v. 140 Barrels of Flour, 2 Story, 195, Fed. Cas. No. 13,253.

[10] Undaunted, Lush. 90; Marguerite Molinas (1903) P. 160; Flottbek, 118 Fed. 954, 55 C. C. A. 448.

[11] Cairo, L. R. 4 A. & E. 184.

[12] Porter v. Friendship, Fed. Cas. No. 10,783.

[13] Butterworth v. Washington, Fed. Cas. No. 2,253; Lamar v. Penelope, Fed. Cas. No. 8,007; F. I. Merryman (D. C.) 27 Fed. 313; Æolus, L. R. 4 A. & E. 29.

[14] BLACKWALL, 10 Wall. 1, 19 L. Ed. 870; Lydia (D. C.) 49 Fed. 666; Boyne (D. C.) 98 Fed. 444; Connemara, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751; J. M. Guffey Petroleum Co. v. Borison, 211 Fed. 594, 128 C. C. A. 194; Alice, 244 Fed. 415, 157 C. C. A. 41.

[15] Maude, 3 Asp. 338; Allen v. Canada, 1 Bee, 90, Fed. Cas. No. 219.

[16] Adams v. Island City, 1 Cliff. 210, Fed. Cas. No. 55; Staten Island & N. Y. Ferry Co. v. Thomas Hunt, Fed. Cas. No. 13,826; In re 50,000 Feet of Timber, 2 Low. 64, Fed. Cas. No. 4,783.

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bridge should drop a bag of gold or a valuable jewel case into a navigable stream, the salvor should be as much entitled to a reward as if it had been dropped from the deck of a steamer. But in view of the decision of the Supreme Court in COPE v. VALLETTE DRY-DOCK CO. OF NEW ORLEANS,[17] and the decision of the House of Lords in the Gas Float Whitton Case,[18] it is a matter of great doubt whether salvage can be claimed against anything not connected in some way with a vessel of some character.[19]

But if the subject of the salvage service is a ship or something connected therewith, its maritime character is not affected by the fact that it is not rendered on the water. Hence such service rendered to a vessel in a dry dock, whether the dock at the time has been pumped dry or not, comes under this doctrine.[20]

"At Risk or in Distress"

This does not imply actual, imminent danger. It is a salvage service if the vessel is in such a condition as to be in need of assistance, though no immediate danger threatens. The test is thus defined by Dr. Lushington: "All services rendered at sea to a vessel in distress are salvage services. It is not necessary, I conceive, that the distress should be immediate and absolute; it will be sufficient if, at the time the service is rendered, the vessel has encountered any dam-

[17] 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501.

[18] [1897] A. C. 337.

[19] See the discussion of this subject ante, p. 14. Among the subjects considered at the inquisitions of the Cinque Ports Admiralty as far back as the 15th century was: "That A. B. found floating upon the sea 'unam marinam piscem vocatam whale or purpeys. * * *' That A. B. found floating upon the sea a dead man, and on him some money." 2 Select Pleas in Admiralty, xxviii.

[20] Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907; Neshaminy (D. C.) 220 Fed. 182; Id., 228 Fed. 285, 142 C. C. A. 577; Gulfport (D. C.) 243 Fed. 676; Id., 250 Fed. 577, 162 C. C. A. 593.

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age or misfortune which might possibly expose her to destruction if the services were not rendered." [21]

Accordingly, in the Albion,[22] a tug was allowed a salvage reward for bringing in a ship which had inadequate ground tackle, though no immediate storm threatened. And in the Ellora,[23] under similar weather conditions, salvage was allowed for bringing in a steamer which had lost her crew, though she was fully rigged with sails.

The hoisting of a signal for help is evidence that help is needed.[24]

"By Those under No Obligation to the Vessel to Render It"

This is usually briefly expressed in the books by speaking of salvage as a service "voluntarily rendered," and is meant to exclude services rendered by those under some contractual or binding obligation.[25] Hence, as a rule, the crew of the distressed vessel cannot claim salvage, for that is a part of their duty. Nor can her pilot, for the same reason. Nor can the tug towing her, under ordinary circumstances, for that is a part of the contract of towage. Nor can a passenger, for he is working as much to save himself as to save the vessel. Nor can the life-saving crews, for they are paid to do that very work.

Independent of statute, there was no obligation beyond a moral one upon any other vessel to render aid to vessels in distress. But on August 1, 1912, an act was passed, the second section of which made it obligatory to render aid as far as necessary to protect human life, and as far as can

[21] Charlotte, 3 W. Rob. 68. See, also, Calyx, 27 T. L. R. 166; Rambler, [1917] 2 Ir. 406; Hekla (D. C.) 62 Fed. 941; Urko Mendi (D. C.) 216 Fed. 427.

[22] Lush. 282.

[23] Lush. 550.

[24] M. B. Stetson, Fed. Cas. No. 9,363; Mira A. Pratt (D. C.) 31 Fed. 572.

[25] Fannie Brown (D. C.) 30 Fed. 215.

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be done without serious danger to the salving vessel, her crew or passengers.[26]

Hence the old expression in the books "by those under no legal obligation to render it," is to that extent modified. There are circumstances under which these different classes may claim salvage, but an examination will show that, so far from weakening the general rule above stated, these circumstances emphasize and confirm it.

Same—The Crew

The reason why they cannot ask salvage is that they are but fulfilling their contract of hiring when they work to save their ship. Hence, after the dissolution of such contract, they are free to claim it. Accordingly, in the Warrior,[27] where a ship had gone aground and her master took his crew ashore and discharged them, some of the crew who came back subsequently, and saved much of her stores and cargo, were allowed to claim salvage.

In the Florence,[28] the master abandoned his vessel at sea and took the crew ashore. Some of them returned to the wreck in another vessel, and assisted in saving the Florence. They were held entitled to salvage.

In the Le Jonet,[29] all the crew but the mate left the vessel, which had been injured in collision. He remained aboard, hoisted signals of distress, and secured thereby the aid of a steamer, which took her into port. He was awarded salvage.

[26] 37 Stat. 242 (U. S. Comp. St. § 7991), Appx. 425.

[27] Lush. 476.

[28] 16 Jur. 572.

[29] L. R. 3 A. & E. 556. See, on the general subject, C. F. Bielman (D. C.) 108 Fed. 878; Gilbraith v. Stewart Transp. Co., 121 Fed. 540, 57 C. C. A. 602, 64 L. R. A. 193; Comet (D. C.) 205 Fed. 991; Zapora (D. C.) 205 Fed. 1004; Georgiana, 245 Fed. 321, 157 C. C. A. 513.

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Same—The Pilot

A pilot cannot claim salvage for ordinary pilotage services, as they are covered by his pilot's fee. If, however, he does work outside the duties of a pilot, like working at the pumps or laying anchors and cables, he may claim as salvor. Perhaps the best expression of the principle is Dr. Lushington's remarks in the Saratoga:[80] "In order to entitle a pilot to salvage reward, he must not only show that the ship is in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward."

An important case on the subject is Akerblom v. Price.[81]

The awards to state pilots, however, are moderate from motives of public policy, and the temptation which high awards might offer.[82]

Same—The Tug

Under the head of towage, the circumstances under which a towage contract may be turned into a salvage service not contemplated by the original contract have already been discussed. Ante, p. 124, c. 5, § 57.

Same—Passengers

Services rendered by a passenger in common with others can give no claim to salvage, as he is working for that self-preservation which is the first law of nature. But when he has an opportunity of saving himself, and stays by the ship instead of embracing such opportunity, his situation is an-

[80] Lush. 318.

[81] 7 Q. B. D. 129. See, also, Monarch, 12 P. D. 5; Bedeburn, [1914] P. 146, 30 T. L. R. 513.

[82] Relief (D. C.) 51 Fed. 252.

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alogous to the crew after the dissolution of their relation to the ship, and he may earn salvage.[33]

So, too, a passenger who renders special services different from the rest of those aboard, as one who rigged up an ingenious steering apparatus for a disabled vessel, was awarded salvage in Towle v. Great Eastern,[34] though this is nearer the border line, and is hard to reconcile with the decision of Lord Stowell in the leading case of the BRANSTON.[35]

Same—Government Employés

These cannot claim salvage for acts done as part of their public duties, as when the life-savers remove a crew or their property from a wreck, or a vessel of the navy suppresses a mutiny on a merchant vessel. But the better opinion is that they may claim for services outside their regular duties. For instance, in the Cargo of the Ulysses,[36] men from a vessel of the royal navy were refused salvage for protecting a wreck from plunderers, but allowed it for work in removing cargo.

Parties Responsible for the Peril

Those identified with a vessel which has caused the danger by a careless collision can not claim salvage.[37]

"Which Results in Benefit to the Property if Eventually Saved"

It is usually said that success is essential to constitute a salvage service; for unless the property is saved it is not

[33] Newman v. Walters, 3 Bos. & P. 612.

[34] Fed. Cas. No. 14,110. In Connemara, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751, a passenger was allowed salvage for first discovering a fire and then for extraordinary services in the handling of the steam pump and hose.

[35] 2 Hagg. Ad. 3, note; Candee v. 68 Bales of Cotton (D. C.) 48 Fed. 479.

[36] 13 P. D. 205. See, also, Cayo Bonito, [1904] P. 310; Sarpen, [1916] P. 306; Carrie, [1917] P. 224.

[37] Clarita, 23 Wall. 1, 23 L. Ed. 146; Noreuga (D. C.) 211 Fed. 355; Duc d'Aumale, [1904] P. 60.

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a service, as a benefit actually conferred is the very foundation. A salvor may find a ship a thousand miles at sea, but if he loses her at the very harbor bar he forfeits his claim; for he has conferred no benefit upon her or her owners.[38]

Hence salvage awards are made sufficiently liberal to pay not only for the special service, but to encourage salvors to undertake other enterprises not so promising. And therefore salvors who do not complete their job can claim nothing if the vessel is subsequently rescued by other salvors, unless their efforts result in placing the vessel in a better position, and thereby facilitating the work of subsequent salvors.

For instance, in the KILLEENA,[39] a vessel put five of her crew aboard the Killeena, which was a derelict, to bring her into port. After a few days, they had enough of it, and were taken aboard another vessel at their own request. The second vessel then put some of her crew aboard, and took her in tow until the rope broke. The second crew secured the assistance of a steamer, stuck by the derelict, and brought her in. The first set were refused salvage, but the others were allowed it.

In the Camellia,[40] a steamer towed the Camellia for half a day, and then had to leave her. But she had towed her 85 miles nearer to port, and about 12 miles nearer her course, thus giving her a better position. The Camellia reached port, and the Victoria was allowed a small sum as salvage.

An indirect service to a second vessel by towing away from her vicinity a vessel in peril and to which the direct service is being rendered does not give any claim against the second vessel.[41]

[38] Sabine, 101 U. S. 384, 25 L. Ed. 982; Connemara, 108 U. S. 852, 2 Sup. Ct. 754, 27 L. Ed. 751.

[39] 6 P. D. 193.

[40] 9 P. D. 27. See, also, August Korff, [1903] P. 166; I. W. Nicholas (D. C.) 147 Fed. 793; City of Puebla (D. C.) 153 Fed. 925.

[41] Thomas Hilyard (D. C.) 55 Fed. 1015; City of Columbia (D. C.) 56 Fed. 252; San Cristobal, 230 Fed. 599, 144 C. C. A. 653.

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THE AWARD—AMOUNT IN GENERAL

64. The amount of a salvage award varies according to the character and skill of the salvors, the locality, the inducements necessary to encourage the service, the value of the property saved or of the salvor's property at risk, the danger to salvors and saved, the skill and labor involved, and the degree of success achieved.

Having discussed the general nature of salvage, the question of degree must now be considered, and the circumstances which swell or reduce the award.

From a simple service that is salvage only in name, to those acts of heroism whose bare recital quickens the pulse, the range is immense. Hence no rule can be laid down by which a salvage service can be measured accurately. Each case has its peculiar circumstances, and the amount of a salvage award is largely a matter of judicial discretion, varying with the idiosyncrasies of the judge, and regulated only by certain general rules. These are largely corollaries from the fundamental doctrine that salvage is the outgrowth of an enlightened public policy, and is awarded, not merely on a niggardly calculation pro opere et labore in the special case, but as an encouragement to induce the salvor and future salvors to incur risk in saving life and property.

SAME—ELEMENTS OF COMPENSATION AND BOUNTY

65. A salvage award consists of two elements:

(a) Compensation for actual outlay and expenses made in the enterprise.

(b) The reward as bounty, allowed from motives of public policy as a means of encouraging extraordinary exertions in the saving of life and property.

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The first of these items is practically a constant quantity; as a salvor, if his service is important, is always entitled, at least, to be repaid his expenses and to be paid for his labor.

The second element of salvage, or the bounty element, is the variable quantity in salvage awards. Being given on motives of public policy, it is more or less according to the merits of the service and the ability of the owners to contribute out of the funds saved.[42]

The element of expense is always considered by the court, and usually allowed specifically, but not necessarily so. On this subject the House of Lords, in the DE BAY,[43] says: "It was contended that some of these items ought not to be taken into consideration at all, as, for instance, the loss on charter; and it was further contended that in no case ought the items of loss or damage to the salving vessel be allowed as 'moneys numbered,' but that they should only be generally taken into account when estimating the amount to be awarded for salvage remuneration. Their lordships are of opinion that this objection is not well founded. It was argued that by allowing the several items of the account, and then a further sum for salvage, the salvors would receive payment for their losses twice over; but this is only on the supposition that the court below, after giving the amount of the alleged losses specifically, has considered them again generally in awarding £5,000 for simple salvage services. It is not to be presumed that the learned judge has fallen into such an error, and, indeed, it appears that he has not done so, but that he considered the £5,000 a reasonable amount for salvage reward, wholly irrespective of damage and expenses. Their lordships are of opinion that it is always justifiable, and sometimes important, when it can

§ 65. [42] Egypt (D. C.) 17 Fed. 359; Pleasure Bay (D. C.) 226 Fed. 55.

[43] 8 A. C. 559. See, also, Fairport, [1912] P. 168; Angele, [1901] A. C. 549; Pelican (D. C.) 158 Fed. 183.

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be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage service. It is frequently difficult and expensive, and sometimes impossible, to ascertain with exactness the amount of such loss, and in such case the amount of salvage must be assessed in a general manner, upon so liberal a scale as to cover the losses, and to afford also an adequate reward for the services rendered. In the assessment of salvage regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the owner of that benefit which it is the object of the salvage services to secure him. If, as in the present case, the fund is ample, it is but just that the losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, for whose advantage the sacrifice has been made, and, in addition to this, the salvor should receive a compensation for this exertion and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual; for, if no more than a restitutio in integrum were awarded, there would be no inducement to shipowners to allow their vessels to engage in salvage services. If there be a sufficient fund, and the losses sustained by the salvor are ascertained, it would be unreasonable to reject the assistance to be derived from that knowledge when fixing the amount of salvage reward, and their lordships are unable to appreciate the argument that that which is known may be taken into account generally, but not specifically."

Professional Salvors

It follows from these considerations that the greatest encouragement should be extended to those most competent to render the service. Hence the courts look with special favor on the efforts of steamers, and will not diminish their award on account of the rapidity of their service, but rather

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incline to enhance it, as promptness is specially commendable.[44]

Special favor is shown to steamers equipped for salvage work and to professional salvors, in view of the large expense of being always ready, even when no wrecks are reported, the rapid deterioration of such property, the difficulty in protecting it by insurance, and the importance of having the business in the hands of reputable men.[45]

Locality as Affecting the Award

The awards may vary with the locality. The courts of the South Atlantic Coast have felt called upon to be liberal to salvors, on account of the special dangers of that coast, including Hatteras, the turning point of the winds, and a long and desolate seaboard devoid of harbors and populous cities. From these causes and the comparative fewness of craft, the dangers of distressed vessels are multiplied, and hence the same service is better paid than if rendered on the Northern Coast, where harbors are abundant and passers-by are frequent.[46]

Increase or Diminution of Previous Rate of Allowance

Salvage awards, being made on grounds of public policy, may vary at different times. If the courts find that the inducements held out are not sufficiently liberal to secure the service, if they find that distress signals are unheeded and valuable property abandoned, they will increase their awards, and, vice versa, if smaller awards will secure such efforts, they will diminish them.[47]

[44] London Merchant, 3 Hagg. Ad. 394; Swiftsure (D. C.) 4 Fed. 463; Colon (C. C.) 4 Fed. 469.

[45] GLENGYLE [1898] P. 97; Id., [1898] A. C. 519; Susan, 1 Spr. 499, Fed. Cas. No. 13,630; Camanche, 8 Wall. 448, 19 L. Ed. 397; St. Paul (D. C.) 82 Fed. 104; Id., 86 Fed. 340, 30 C. C. A. 70.

[46] Mary E. Dana, 5 Hughes, 362, 17 Fed. 358; Fannie Brown (D. C.) 80 Fed. 222, 223; Cohen, Adm. 131.

[47] Daniel Steinman (D. C.) 19 Fed. 921, 922; Edam (D. C.) 13 Fed. 140, 141.

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SAME—INCIDENTS OF THE SERVICE

66. In addition to the above general considerations, the following elements in each special case enhance or diminish the amount of the award, according to their relative degree.

(a) The degree of danger from which the lives or property are rescued.

(b) The value of the property saved.

(c) The value of the salvor's property employed and the danger to which it is exposed.

(d) The risk incurred by the salvors.

(e) The skill shown in the service.

(f) The time and labor occupied.

(g) The degree of success achieved, and the proportions of value lost and saved.[48]

The Danger

The largest awards have usually been given where life was at stake. Courts have differed as to whether the risk which the salvor himself incurs, or that from which the others are delivered, ought first to be considered, but they do not differ as to the paramount merit of a service into which either of these ingredients enters.[49]

So, too, as to risk incurred by the property itself, primarily of the salved, secondarily of the salvor. The greater the risk, the greater the merit of the service and the greater the award.

Under this head, the awards in derelict cases may be considered. Derelicts are necessarily in greatest danger. They become derelicts because their crews abandon them as sink-

§ 66. [48] Sandringham (D. C.) 5 Hughes, 316, 10 Fed. 556.

[49] William Beckford, 3 C. Rob. 356; Traveller, 3 Hagg. 371; Cargo ex Sarpedon, 3 P. D. 28; Akaba, 54 Fed. 197, 4 C. C. A. 281; Edith L. Allen (D. C.) 139 Fed. 888.

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ing vessels, and, even if they do not at once go down, the chance of finding them is small. Hence it was long the practice of the admiralty courts to award half in such cases. But the later decisions, looking at the reason rather than the rule, consider all the circumstances, and give less than half, if a lesser amount will handsomely reward the salvor.[50]

As expressed by Dr. Lushington in the TRUE BLUE[51]: "The fact of derelict is, as it were, an ingredient in the degree of danger in which the property is."

The Values and Risk Incurred

The value of the property saved is an important element. For a long time the courts were in the habit of giving fixed proportions. In fact, originally the salvors were probably paid in kind. In modern times the rule of proportion has been discarded.

On small values saved the proportion is necessarily greater than on large. Hence, when values are very great, the awards do not proportionately increase. The court will give a sufficient sum to compensate the salvors handsomely for their labor and risk, and encourage them to go and do likewise, but then its object is accomplished. In an ordinary case of towage salvage, for instance, its award for saving $500,000 would not be as great in proportion as its award for saving $300,000.[52]

In many cases there may be risk to the salvors and their property, where there is but little risk to the salved. If so, it is a material fact in fixing the award.[53]

[50] Sandringham (D. C.) 5 Hughes, 316, 10 Fed. 556; TRUE BLUE, L. R. 1 P. C. 250; Amerique, L. R. 6 P. C. 468; Janet Court, [1897] P. 59; Gardner v. Ninety-Nine Gold Coins (D. C.) 111 Fed. 552; Flora Rodgers (D. C.) 152 Fed. 286.

[51] L. R. 1 P. C. 250.

[52] CITY OF CHESTER, 9 P. D. 202–204.

[53] Ereza (D. C.) 124 Fed. 659; Launch B. B., 15 Can. Ex. 389; 17 D. L. R. (Can.) 757.

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The Skill

The skill shown by the salvors is an important element, to which the court pays great attention. It is on this account that professional salvors are especially encouraged and most liberally rewarded, for they usually possess special skill and experience. Volunteer salvors are only expected to show the skill incident to their calling, and are only paid for such. Unskillfulness causing damage will diminish a salvage award, though the court makes all allowances for salvors.[54]

A salvor may be legally chargeable with negligence as to third parties, and yet not be negligent as to the property saved. For instance, where two tugs in New York Harbor were towing a vessel away from a burning dock, and owing to their insufficient power brought her into collision with other vessels, they were held liable to these vessels, but entitled to have the damages for which they are liable considered in fixing the salvage award.[55]

Misconduct or bad faith will cause a diminution or even an entire forfeiture of salvage; for, as public policy is the foundation of the doctrine, good faith and fair dealing are essential.[56]

The Time and Labor

As to the time and labor occupied, if the service involves a long time and great labor, it will, be taken into account. In the case of steamers, however, the shortness of time does

[54] Magdalen, 31 L. J. Ad. 22; Cheerful, 11 P. D. 3; Baker Standard, [1901] A. C. 549; U. S. v. Taylor, 188 U. S. 283, 23 Sup. Ct. 412, 47 L. Ed. 477; Dorrington v. Detroit, 223 Fed. 232, 138 C. C. A. 474; Halcyon, 239 Fed. 840, 152 C. C. A. 626; George W. Elzey, 250 Fed. 602, 162 C. C. A. 618.

[55] Ashbourne (D. C.) 99 Fed. 111; No. 92, 252 Fed. 117, 164 C. C. A. 229.

[56] CLANDEBOYE, 70 Fed. 631, 17 C. C. A. 300; North Carolina, 15 Pet. 40, 10 L. Ed. 653; Boston, 1 Sumn. 341, Fed. Cas. No. 1,673; Bello Corrunes, 6 Wheat. 152, 5 L. Ed. 229; Gov. Ames, 108 Fed. 969, 48 C. C. A. 170; Celtic Chief, 230 Fed. 753, 145 C. C. A. 63.

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not detract from the service. Dr. Lushington put this very well when he said that he could not understand why the patient should complain of the shortness of an operation.[57]

The Result Achieved

As to the degree of success achieved, and the proportion of values lost and saved, the principle is that, if the entire property is saved, the owner, having suffered less, can better afford to pay handsomely than if only a portion is saved, and the salvor is to be paid out of a mere remnant.

For instance, other things being equal, the court will decree a larger award if an entire cargo of $100,000 is saved than it would if out of an entire cargo of $300,000 only $100,000 were saved.[58]

SALVAGE CONTRACTS

67. A salvage contract is binding if free from circumstances of imposition and the negotiations are on equal terms; but not if the salvor takes advantage of his position, or if either is guilty of fraud or misrepresentation.

In modern times salvage generally springs from contract. The courts at one time went far in doing away with the binding effect of such contracts, saying that the amount agreed on is only presumptive evidence, and may be inquired into.

As to the general principle there should not be any difference between a salvage contract and any other. Circumstances of fraud, oppression, or inequality will affect any

[57] General Palmer, 5 Notes of Cas. 159; Thomas Fielden, 32 L. J. Ad. 61; Andalusia, 12 L. T. (N. S.) 584; B. C. Terry (D. C.) 9 Fed. 920, 927; Connemara, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751.

[58] Sandringham (D. C.) 5 Hughes, 316, 10 Fed. 556; Isaac Allerton, Fed. Cas. No. 7,088.

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contract. Hence it is easy to understand why a contract made at sea between a helpless wreck and an approaching rescuer should be inquired into, like a contract made on land under the persuasive muzzle of a revolver. But when the circumstances show no inequality of negotiation, as when the owner of a sunken vessel, after ample deliberation, contracts to have his vessel raised, there is no reason on principle, why he should not be held to his bargain, though it should turn out to be a bad one. And so the Supreme Court has decided.[58]

SALVAGE APPORTIONMENT

68. A salvage award is apportioned among those who contribute directly or indirectly to the service, including the owners of the salving property at risk; and admiralty has jurisdiction of a suit to compel an apportionment.

Having discussed the doctrines governing the assessment of a salvage award, it is now necessary to consider to whom the amount so fixed should be paid. As a rule, it goes only to those who participated, directly or indirectly, in the service. All the salving crew share, those immediately engaged most largely; but those whose work on the salving vessel is increased also share in less proportion. The owners of the salving vessel, though not present, participate on account of the risk to which their property is exposed. If the salving vessel is a steamer, her owners receive much the greater portion, on account of the efficiency of such vessels. In such cases it is the rule to award the owners three-fourths.[60]

[58] Elfrida, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413 (reversing 77 Fed. 754, 23 C. C. A. 527). See, also, Sir William Armstrong (D. C.) 53 Fed. 145; Kennebec, 231 Fed. 423, 145 C. C. A. 417; Humarock (D. C.) 234 Fed. 716; Akerblom v. Price, 7 Q. B. D. 129; Port Caledonia, [1903] P. 184.

§ 68. [60] City of Paris, Kenn. Civ. Salv. 154; Cape Fear Towing

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Independent of statute, the fact that salvor and salved vessels belonged to the same owner did not prevent the owner of the salving vessel from claiming salvage against the cargo of the salved vessel, where there was no breach of the contract of carriage.[61]

Nor did it prevent the crew of the salving vessel from claiming salvage for their work, both to the salved vessel and her cargo.[62]

And now it is provided by statute that "the right to remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services."[63]

Of the amount set aside for the crew, the master, on account of his responsibilities, receives a larger proportionate share,[64] and the remainder is divided among the crew in proportion to their wages, unless special circumstances call for special allowances. Passengers or other persons aboard the salving ship may share if they render aid.

It is frequently necessary to make a salvage award as a whole, and then opportion it among different sets of salvors. The apportionment is made according to their relative merits, though the first set of salvors usually receive special consideration.[65]

Admiralty has jurisdiction of a suit by co-salvors to compel a refunding by a salvor to whom the entire award has been paid.[66]

& Transp. Co. v. Pearsall, 90 Fed. 435, 33 C. C. A. 161; City of Puebla (D. C.) 153 Fed. 925; Gibson (D. C.) 160 Fed. 230.

[61] Gilchrist Transp. Co. v. 110,000 Bushels of No. 1 Northern Wheat (D. C.) 120 Fed. 432.

[62] Rees v. U. S. (D. C.) 134 Fed. 146; Glenfruin, 10 P. D. 103.

[63] Act Aug. 1, 1912, § 1, 37 Stat. 242 (U. S. Comp. St. § 7990); Appx. 425; Roanoke, 214 Fed. 63, 130 C. C. A. 503.

[64] Tijuca (D. C.) 247 Fed. 358.

[65] Santipore, 1 Spinks, 231; Livietta, 8 P. D. 24; Strathnevis (D. C.) 76 Fed. 855; Annie Lord (D. C.) 251 Fed. 157.

[66] McMullin v. Blackburn (D. C.) 59 Fed. 177.

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SALVAGE CHARGEABLE AS BETWEEN SHIP AND CARGO

69. A salvage award is charged against vessel and cargo in proportion to their values at the port of rescue, each being severally liable for its share alone. Freight contributes pro rata itineris.

The salvor has a remedy in rem against the property saved.

The principle is that vessel, cargo, and freight money saved are to contribute according to their relative values at the port of rescue. The same percentage is charged against all, though portions were saved more easily and were at less risk; the reason being that differences in this respect would produce endless confusion, and tempt the salvors to save portions of the cargo without attempting to rescue other portions. Specie is subject to the same rule.[67]

If the voyage has not been completed, the court will prorate the freight money from the initial point to the port of rescue, and make only that proportion of the freight contribute. For instance, if the voyage is one-third completed at the time of the accident, the value of one third of the freight will be taken, on which salvage will be assessed.[68]

As between ship and cargo, each is liable severally only for its own proportion. The salvor who neglects to proceed against both cannot recover his entire salvage from one.[69]

§ 69. [67] St. Paul, 86 Fed. 340, 30 C. C. A. 70; Longford, 6 P. D. 60. But where one series of operations saved the vessel and another the cargo, there may be separate proceedings against each, and different percentages assessed. St. Paul, supra.

[68] NORMA, Lush. 124; Sandringham (D. C.) 5 Hughes, 316, 10 Fed. 556; Kaffir Prince, 31 T. L. R. 296.

[69] Raisby, 10 P. D. 114; Jewell (D. C.) 41 Fed. 103; Alaska (D. C.) 23 Fed. 597. But the court may charge the entire amount against the ship, if the disaster was caused by any act for which the ship

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The Lamington [70] contains an interesting compilation of salvage precedents.

A salvage service gives a maritime lien upon the property saved, enforceable by a proceeding in rem, and not dependent upon the salvor's retention of possession.[71]

It may be asserted against government property, if the possession of the government is not disturbed.[72]

Under Supreme Court admiralty rule No. 19, suit may also be brought in personam against the party at whose request and for whose benefit the salvage service has been performed.

But such proceedings, whether in rem or in personam, must now be brought within two years from the rendition of the service, unless there has been no reasonable opportunity to proceed within that time.[73]

would be responsible to the cargo. Lackawanna (D. C.) 220 Fed. 1000.

[70] 86 Fed. 675, 30 C. C. A. 271.

[71] Sabine, 101 U. S. 384, 25 L. Ed. 982; Byrne v. Johnson, 53 Fed. 840, 4 C. C. A. 47; Barnett & Record Co. v. Wineman, 202 Fed. 110, 122 C. C. A. 222; Alcazar (D. C.) 227 Fed. 633.

[72] Davis, 10 Wall. 15, 19 L. Ed. 875; Johnson Lighterage Co. No. 24 (D. C.) 231 Fed. 365.

[73] Act Aug. 1, 1912, § 4, 37 Stat. 242 (U. S. Comp. St. § 7993), Appx. 425.

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CHAPTER VII

OF CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES

70–72. "Contracts of Affreightment" Defined, and Distinguished from Charter Parties.
73. Warranties Implied in Contracts of Affreightment against Unseaworthiness and Deviation.
74. Mutual Remedies of Ship and Cargo on Contracts of Affreightment.
75. Entirety of Affreightment Contract.
76. Apportionment of Freight.
77–78. Ship as Common Carrier.
79. Bill of Lading—Making and Form in General.
80. Negotiability.
81. Exceptions in General.
82. Exception of Perils of the Sea.
83. "Charter Parties" Defined.
84. Construction of Charter Parties.
85. Conditions Implied in Charter Parties of Seaworthiness and against Deviation.
86. Cancellation Clause in Charter Parties.
87. Loading Under Charter Parties.
88. Execution of Necessary Documents under Charter Parties.
89. Cesser Clause in Charter Parties.

"CONTRACTS OF AFFREIGHTMENT" DEFINED, AND DISTINGUISHED FROM CHARTER PARTIES

70. A vessel may be operated by her owners on their own account, or she may be hired by her owners to others.

71. The hiring of a vessel to others is usually done by charter parties.

72. When a vessel is operated by her owners on their own account, or contracts direct with her shippers, such contracts are called "contracts of affreightment."

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The contracts of vessels heretofore discussed have been those incidental transactions tending to facilitate the object of her creation. The class of contracts with which we are now to deal spring directly out of her use as a business enterprise.

A vessel is made to plow the seas, not to rot at the piers. But, with the exception of those which are used as toys by the rich, they do not plow the seas for amusement. The reward earned for transporting cargo is called "freight." In BRITTAN v. BARNABY,[1] Mr. Justice Wayne defines "freight" as the hire agreed upon between the owner or master for the carriage of goods from one port or place to another.

WARRANTIES IMPLIED IN CONTRACTS OF AFFREIGHTMENT AGAINST UNSEAWORTHINESS AND DEVIATION

73. In contracts of affreightment there is an implied warranty of seaworthiness and against deviation.

The warranty of seaworthiness in the relations between vessel and shipper is one of the most severe known to the law. It is that, at the commencement of the voyage, the vessel shall be thoroughly fitted for the same, both as regards structure and equipment. It is not merely that the vessel owner will exercise reasonable care to have her in this condition, or that he will repair such things as are discoverable, but it is an absolute warranty of fitness for the voyage against even such defects as are latent.[2]

§§ 70–72. [1] 21 How. 527, 16 L. Ed. 177. Under the limited liability act, the word "freight" includes prepaid fare of passengers, but not a government subsidy. Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; post, p. 371.

§ 73. [2] Northern Belle, 154 U. S. 571, 14 Sup. Ct. 1166, 19 L. Ed. 748; CALEDONIA, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

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The warranty against deviation is that the vessel will pursue her voyage by the accustomed route without unnecessary delay; though going to a port a little out of the straight course, when it is shown to be the usage of that navigation for vessels to stop by such a port, would not be considered a deviation.[3]

These two warranties apply also to charter parties, and will be treated more fully in that connection.[4]

MUTUAL REMEDIES OF SHIP AND CARGO ON CONTRACTS OF AFFREIGHTMENT

74. It is a fundamental principle that the ship is pledged to the cargo and the cargo to the ship for the fulfillment of the conditions of the contract of carriage.

This reciprocal right of procedure is one of the most ancient doctrines of the admiralty. Under it, the vessel has a lien upon the cargo for its freight money.[5]

This lien or right of the vessel to hold the cargo for its freight money differs from the admiralty liens heretofore discussed in the fact that it is dependent upon actual or constructive possession. The vessel owner who delivers the cargo unconditionally into the possession of the consignee loses his right to hold the cargo itself for his freight.[6]

But one of the principles of the law of freight is that freight is not due until the cargo is unloaded and the consignee has an opportunity to inspect the goods and ascer-

[3] HOSTETTER v. PARK, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568; Prussia (D. C.) 100 Fed. 484.

[4] Post, p. 171.

§ 74. [5] Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; Seaboard (D. C.) 119 Fed. 375; Jebsen v. A Cargo of Hemp (D. C.) 228 Fed. 143.

[6] Pioneer Fuel Co. v. McBrier, 28 C. C. A. 466, 84 Fed. 495; Cargo of Fertilizer (D. C.) 88 Fed. 984; Appam (D. C.) 243 Fed. 230.

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tain their condition. Hence the master of a vessel cannot demand his freight as a condition precedent to unloading; nor, on the other hand, can the consignee demand the goods as a condition precedent to paying the freight. The master, in other words, must discharge his goods, but not deliver them. If he and the consignee are dealing at arm's length, his proper procedure would be to discharge them in a pile by themselves, notifying the consignee that he does not give up his lien for freight; or, if necessary for their protection, discharge them into a warehouse, or into the hands of a third person. Then if the consignee, after a reasonable time allowed for inspection, does not pay the freight, the master can proceed in rem against the goods to enforce its payment.[7]

Conversely, the cargo has a right of procedure against the ship for any violation of the contract of affreightment.[8]

Transactions more thoroughly marine in nature than the relations of ship and cargo could hardly be imagined. Yet one result of the common-law warfare upon the admiralty in England, and the contention that contracts made on land, no matter what their subject-matter, were without the admiralty, was that in England the admiralty courts lost jurisdiction over such controversies.[9]

It was partially restored by Act 24 Vict. c. 10, § 6, but only to the extent of giving a power to arrest, not a lien, and giving that only against vessels no owner or part owner of which resided in England or Wales.[10]

[7] BRITTAN v. BARNABY, 21 How. 527, 16 L. Ed. 177; BAGS OF LINSEED, 1 Black, 108, 17 L. Ed. 35; Nathaniel Hooper, Fed. Cas. No. 10,032; Cassius, 2 Story, 81, Fed. Cas. No. 564; Treasurer, 1 Spr. 473, Fed. Cas. No. 14,159.

[8] Rebecca, 1 Ware, 187, Fed. Cas. No. 11,619; Bulkley v. Naumkeag Steam Cotton Co., 24 How. 386, 16 L. Ed. 599; Humarock (D. C.) 234 Fed. 716.

[9] Cargo ex Argos, L. R. 5 P. C. 146–148.

[10] Pieve Superiore, L. R. 5 P. C. 482; Scrutton on Charter Parties and Bills of Lading, 376–380, 406.

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ENTIRETY OF AFFREIGHTMENT CONTRACT

75. The contract of affreightment is an entire contract, so that freight is not earned until the contract is completed.

On this subject Mr. Justice Story says in the Nathaniel Hooper, above cited: "The general principle of the maritime law certainly is that the contract for the conveyance of merchandise on a voyage is in its nature an entire contract, and, unless it be completely performed by the delivery of the goods at the place of destination, no freight whatsoever is due; for a partial conveyance is not within the terms or the intent of the contract, and, unless it be completely performed by the delivery of the goods at the place of destination, no freight whatsoever is due, and the merchant may well say 'Non in hæc fœdera veni.'"

Under this principle, in case of a marine disaster, the master has the right to repair and complete the voyage, although this action on his part involves delay; or he may transship the goods into another vessel and so save the freight. If the delay or the condition of the goods is such as to render either of these expedients unprofitable, he may sell the goods at an intermediate port, and terminate the venture, but in the latter case he would not be entitled to his freight.[11]

But if the voyage is broken up before completion, though from a cause beyond his control, he loses his freight.[12]

§ 75. [11] Jordan v. Warren Ins. Co., Fed. Cas. No. 7,524; Hugg v. Augusta Ins. & Banking Co., 7 How. 595, 12 L. Ed. 834. If he carries part of the cargo contracted for, he can recover freight for the part so carried less damages for his failure to carry the rest. Edward Hines Lumber Co. v. Chamberlain, 118 Fed. 716, 55 C. C. A. 236.

[12] Appam (D. C.) 243 Fed. 230. The voyage was not broken up when the crew left a ship under orders of a hostile submarine, with-

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APPORTIONMENT OF FREIGHT

76. Freight is payable pro rata at an intermediate port, if the voyage is broken up, only by the consent of the consignee, either actual, or implied from his voluntarily receiving his goods at such intermediate port.

This is not an exception to the general rule based upon the principle of entirety of contracts, that freight is only due when the voyage is completed. It is tantamount to saying that the parties, by mutual agreement, may rescind the contract at an intermediate port. Hence the acceptance of the goods at an intermediate port, not voluntarily, but in pursuance of a practical necessity on the part of the consignee to receive them, does not entitle the vessel to pro rata freight, and if the vessel incurs expenses before leaving the initial port at all, or "breaking ground," as it is technically called, no pro rata freight could be equitably claimed.[13]

A provision requiring the shipper to prepay the freight on delivery of the goods to the carrier, and authorizing the carrier to retain it if prevented from proceeding by causes beyond his control (for instance, an embargo), will be enforced, though the vessel never broke ground.[14]

The delivery of the cargo on a wharf with notice to the

out the intent to abandon permanently; the ship having been subsequently brought into port. Bradley v. Newsum, 34 T. L. R. 613.

§ 76. [13] Sampayo v. Salter, 1 Mason, 43, Fed. Cas. No. 12,277; Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747; Mitsui v. St. Paul Fire & Marine Ins. Co., 202 Fed. 26, 120 C. C. A. 280. As to the meaning of "breaking ground," see ante, p. 72, note 82.

[14] Allanwilde Transport Corporation v. Vacuum Oil Co., 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312, 3 A. L. R. 15; Gracie D. Chambers, 248 U. S. 387, 39 Sup. Ct. 149, 63 L. Ed. —; Bris, 248 U. S. 392, 39 Sup. Ct. 150, 63 L. Ed. 321.

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consignee, or without notice, if that is the usage of the port, is a termination of the ship's liability as carrier.[15]

The vessel owner is entitled to his freight if the goods arrive in specie, though they have been so injured as to be practically valueless, provided the injury is not caused by such acts as would render the carrier liable.[16]

In a suit by the vessel owner for freight, the consignee may in the same suit plead in recoupment any damage done to the goods for which the carrier is liable.[17]

The receipt of the goods by the consignee is an implied promise on his part to pay the freight (though such implication may be rebutted), and he may be sued for it personally.[18]

SHIP AS COMMON CARRIER

77. A ship may or may not be a common carrier, according to the manner in which she is being used.

78. A general ship is a common carrier.

When is a ship a common carrier, and when not? The test is well laid down in the case of the Niagara,[19] where the court says: "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is in general bound to take the goods of all who offer." Story thus defines a "common carrier": "To bring a person within the descrip-

[15] Constable v. National Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903.

[16] Hugg v. Augusta Ins. & Banking Co., 7 How. 595, 12 L. Ed. 834; Seaman v. Adler (C. C.) 37 Fed. 268.

[17] Snow v. Carruth, 1 Spr. 324, Fed. Cas. No. 13,144; Bearse v. Ropes, 1 Spr. 331, Fed. Cas. No. 1,192.

[18] Trask v. Duvall, 4 Wash. C. C. 181, Fed. Cas. No. 14,144; Vane v. A. M. Wood & Co. (D. C.) 231 Fed. 353; Frontier S. S. Co. v. Central Coal Co., 234 Fed. 30, 148 C. C. A. 46.

§§ 77, 78. [19] 21 How. 22, 16 L. Ed. 41. See, also, Jaminet v. American Storage & Moving Co., 109 Mo. App. 257, 84 S. W. 128.

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tion of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation pro hac vice." [20]

From this definition it is clear that regular liners are common carriers, as is any ship that carries on business for all, and by advertisement or habit carries goods for all alike. A general ship is a common carrier.[21]

On the other hand, a ship chartered for a special cargo, or to a special person, is not a common carrier, but an ordinary bailee for hire.[22]

BILL OF LADING—MAKING AND FORM IN GENERAL

79. The document evidencing the contract of shipment is known as a "bill of lading." Even in the case of chartered vessels, and of course in the case of vessels trading on owner's account, the bill of lading is usually given by the master to the shipper direct, and binds the vessel or her owners to the shipper.

Originally it was a simple paper. Here is an old form: "Shipped by the grace of God, in good order, by A. B., merchant, in and upon the good ship called the John and Jane, whereof C. D. is master, now riding at anchor in the river Thames, and bound for Barcelona, in Spain, 20 bales of broadcloth, marked and numbered as per margin; and

[20] Story, Bailm. § 495.

[21] Liverpool & G. W. S. Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 437, 9 Sup. Ct. 469, 32 L. Ed. 788.

[22] Lamb v. Parkman, 1 Spr. 343, Fed. Cas. No. 8,020; Dan (D. C.) 40 Fed. 691; Nugent v. Smith, 1 C. P. D. 423; C. R. Sheffer, 249 Fed. 600, 161 C. C. A. 526.

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are to be delivered in the like good order and condition at Barcelona aforesaid (the dangers of the sea excepted), unto E. F., merchant there, or to his assigns, he or they paying for such goods, ——— per piece freight, with primage and average accustomed. In witness whereof the master of said ship hath affirmed to three bills of lading of this tenor and date, one of which bills being accomplished, the other two to stand void. And so God send the good ship to her destined port in safety.

"Dated at London the ——— day of ———."

This form is substantially the same as that used to-day by the coastwise schooners.

But under modern business methods a shipper of produce for export, like cotton, tobacco, or grain, can go to his railway station far inland, and procure a through bill of lading to England or the Continent. This is a very elaborate document, amphibious in nature, as half its stipulations apply to land carriage and half to water carriage. A sample may be seen in a footnote to the Montana.[23]

SAME—NEGOTIABILITY

80. A bill of lading is negotiable only in a qualified sense. It does transfer the title, but it is not so far negotiable as to shut out all defenses which could be made between the carrier and the original holder.

For instance, in the Treasurer,[24] the assignee of a bill of lading illegally refused to pay the freight. The consignee treated this as rescinding the contract of sale between him and the assignee for the cargo represented by the bill of lading, and sold it to a third party. The assignee thereupon proceeded against the ship. Judge Sprague held that, as he had illegally refused to pay the freight, the master could

§ 79. [23] 129 U. S. 401, 9 Sup. Ct. 469, 32 L. Ed. 788.

§ 80. [24] 1 Spr. 473, Fed. Cas. No. 14,159.

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have sold the cargo, and that the indorsing of the bill of lading to him gave him no greater rights than any other delivery by symbol could have given; that such a delivery had no greater efficacy than a manual delivery of the property itself, and therefore his action could not be maintained.

It is well settled that the master may prove a short delivery of cargo in cases where he is not responsible even against an assignee of a bill of lading.[25]

A master cannot bind the vessel or owners by receipting for goods not actually in his custody, and such defense can be set up even against a bona fide holder of the bill of lading, though it is sometimes a nice question as to the exact point at which the goods passed into the custody of the master.[26]

A recital in the bill of lading that goods are received in good condition puts upon the carrier the burden of proving a loss by excepted perils in case the goods when delivered are in a damaged condition.[27]

SAME—EXCEPTIONS IN GENERAL

81. Independent of statute, a carrier cannot stipulate for exemption from negligence in a bill of lading, as such a stipulation contravenes public policy.[28]

[25] Seefahrer (D. C.) 133 Fed. 793; John Twohy (D. C.) 243 Fed. 720.

[26] American Sugar Refining Co. v. Maddock, 93 Fed. 980, 36 C. C. A. 42; Bulkley v. Naumkeag Steam Cotton Co., 24 How. 386, 16 L. Ed. 599; Missouri Pac. R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; Atchison, T. & S. F. R. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050.

[27] BRITTAN v. BARNABY, 21 How. 527, 16 L. Ed. 177; Nelson v. Woodruff, 1 Black, 156, 17 L. Ed. 97; Jahn v. Folmina, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748.

§ 81. [28] NEW YORK C. R. CO. v. LOCKWOOD, 17 Wall. 357, 21 L. Ed. 627; Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190.

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But he may independent of statute, require the shipper to value the goods in the bill of lading, and limit his liability to that valuation.[79] And he may limit his liability for a passenger's baggage.[80] He may require claims to be made against him in a limited time.[81]

Under the decisions of the English courts, a carrier may stipulate for exemption from negligence. As much of the foreign carrying trade is done in English bottoms, some smart Englishman inserted in their bills of lading a clause known as the "flag clause," which stipulated that the contract of carriage should be governed by the law of the vessel's flag. The object was to protect the English carrier against the American shipper. The American courts as a rule have refused to enforce this clause, looking upon it as an indirect attempt to stipulate against negligence.[82]

It is beyond the limits of this treatise to discuss the construction of the various exceptions contained in bills of lading, or the acts of Congress passed in recent years in regulation of common carriers, and primarily directed at land carriage, though often affecting sea carriage.

[79] Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; Reid v. Fargo, 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156.

[80] Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587.

[81] Southern Express Co. v. Caldwell, 21 Wall. 264, 22 L. Ed. 556; Jamison v. New York & P. S. S. Co. (D. C.) 241 Fed. 389; San Guglielmo, 249 Fed. 589, 161 C. C. A. 514.

[82] Guildhall (D. C.) 58 Fed. 796; Id., 64 Fed. 867, 12 C. C. A. 445; Glenmavis (D. C.) 69 Fed. 472; Victory (D. C.) 63 Fed. 640; Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190.

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SAME—EXCEPTION OF PERILS OF THE SEA

82. The term "perils of the sea" in a bill of lading means accidents incident to navigation which are unavoidable by the use of ordinary care.

There is a mass of learning and refinement of distinction as to the proper construction of that universal clause, "perils of the sea." It means such accidents incident to navigation as are unavoidable and are the sole proximate cause of the loss. Mr. Justice Woods rather broadly defines the expression as "all unavoidable accidents from which common carriers by the general law are not excused, unless they arise from act of God." [83]

The accident from which a carrier is exempted under this clause must arise independently of his acts. If his negligence co-operates, the carrier is responsible.[84] Hence there are a great many decided cases on the question whether the proximate cause of the loss was his act or a peril of the sea.

The G. R. BOOTH [85] is instructive on this point, as it reviews the American decisions. In it the Supreme Court held that a loss caused by an explosion of detonators which blew a hole in the ship, and let the water rush in, was not a peril of the sea; that the phrase alluded to some action of wind or wave, or to injury from some external object, and did not cover an explosion arising from the nature of the cargo; and that the proximate cause was the explosion, and not the inrush of the water.

To show how narrow is the line of demarkation, the court

§ 82. [83] Dibble v. Morgan, 1 Woods, 406, Fed. Cas. No. 3,881. See, also, Southerland-Innes Co. v. Thynas, 128 Fed. 42, 64 C. C. A. 116.

[84] Jeanie, 236 Fed. 463, 149 C. C. A. 515. Compare the meaning of the clause in a marine insurance policy, ante, pp. 75, 80.

[85] 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234.

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distinguishes this from Hamilton v. Pandorf,[86] in which rats had gnawed a lead pipe, which permitted water to escape and cause damage. The House of Lords held that this was a peril of the sea. The Supreme Court distinguished it on the ground that the water escaped gradually, and therefore was the proximate cause.

At first it was thought that a collision caused by the negligence of either of the two vessels was not a peril of the sea, as a human agency intervened. But it is the better opinion that, if the carrying ship is blameless, a collision is a peril of the sea as to her and her cargo, though the other ship was to blame.[87]

Although the measure of care as to deck cargoes may not be as rigid as to others, yet even there a stipulation against perils of the sea does not protect from a loss caused by negligence.[88]

"CHARTER PARTIES" DEFINED

83. When the owners of a vessel hire her out, the contract of hire is called a "charter party," and the hirer is called a "charterer."

There are many different kinds of charter party in use. The owner hires his ship out for a definite time, as for a month or a year. This is called a "time charter."[89] A voyage charter is one in which he hires her out for a definite trip, as, for instance, a single trip between two points, or a round trip from one port by one or more others back to the initial port.

[86] 12 A. C. 518. Compare Citta di Palermo, 226 Fed. 529, 141 C. C. A. 285.

[87] Xantho, 12 A. C. 503; ante, p. 76.

[88] Compania de Navigacion La Flecha v. Brauer, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398.

§ 83. [89] Mary Adelaide Randall, 39 C. C. A. 335, 98 Fed. 895.

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Charters vary also according to the manner in which the hire is payable. A "lump sum" charter, for instance, is one in which the charterer pays a fixed price for the ship. The owner gets his money whether the charterer puts any cargo aboard or not. If he can sublet room to shippers at good rates, the charterer makes a profit; otherwise, a loss. It is much the same transaction as renting a house and trying to sublet the rooms.

A tonnage charter is where the charterer pays a certain rate per registered ton, or per ton of dead weight carrying capacity.[40]

Charters vary also with the cargo to be carried. There are grain charters, cotton charters, petroleum charters, coal charters, charters for general cargo, and many others. Though similar in the main, each has its own peculiar provisions growing out of the needs and customs of the particular business.

Again, an owner may charter his bare ship, leaving the charterer to furnish a crew, or he may merely charter the use of the ship, furnishing the crew himself. This distinction is important if a question should arise whether the owner or the charterer is responsible for any tort of the crew. If the crew is employed by the owner, then they are his agents, and he is responsible for their acts within the scope of their employment. If they are employed by the charterer, the latter is responsible.[41]

Charter parties are usually made by shipbrokers, who keep on hand printed blanks of the various kinds, and execute them by telegraphic or cable authority.

[40] "Dead weight," in its usual acceptation, means the abstract lifting capacity, not deducting dunnage. Thomson v. Brocklebank, 34 T. L. R. 284.

[41] Nicaragua (D. C.) 71 Fed. 723; Bramble v. Culmer, 24 C. C. A. 182, 78 Fed. 497; Clyde Commercial S. S. Co. v. West India S. S. Co., 169 Fed. 275, 94 C. C. A. 551; North Atlantic Dredging Co. v. McAllister Steamboat Co., 202 Fed. 181, 120 C. C. A. 395; Willie, 231 Fed. 865, 146 C. C. A. 61.

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They are usually in writing, but may be by parol.[42]

They have grown to be elaborate in their provisions, being an evolution from experience, as suggested by difficulties actually arising. On the other hand, the additions have frequently been made by laymen, who do not always stop to notice how the condition harmonizes with what is already there. Hence, to the lawyers and judges, they appear informal and inartistic; and in RAYMOND v. TYSON,[43] the Supreme Court so characterizes them, and says that they are to be liberally construed on that account, placing them in the category of legal instruments which are supposed to be drawn by that constant friend of the legal profession—the man who is inops consilii.

CONSTRUCTION OF CHARTER PARTIES

84. A charter party is governed by the ordinary principles of contract law. Provisions which, when violated, defeat the venture, absolve the injured party from the contract. Others, not so vital, give, if violated, a claim for damages.

A charter party is, after all but an ordinary contract, and is governed by the rules that apply in the construction of ordinary contracts.

Special Provisions in

An agreement by the charterer to return the vessel in as good order as received, reasonable wear and tear excepted, or similar language, imposes on him the absolute obligation to return her, independent of any question of due care on his part, unless the failure to return is due to some act or default of the vessel owner.[44]

[42] James v. Brophy, 18 C. C. A. 49, 71 Fed. 310; Gormley v. Thompson-Lockhart Co. (D. C.) 234 Fed. 478, 479.

[43] 17 How. 53, 15 L. Ed. 47. See, also, Disney v. Furness, Withy & Co. (D. C.) 79 Fed. 810, 816.

§ 84. [44] Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22

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In LOWBER v. BANGS,[45] the instrument contained a provision that the vessel (which, as is often the case, was not at the loading port when the charter was effected), should proceed to the loading port "with all possible dispatch." She did not do so. The court held that, on account of the necessity of promptness in commercial enterprises, this provision was not a collateral clause, whose breach would give rise merely to an action for damages, but that it was a warranty, whose breach avoided the contract and released the charterers. It would also give a right of action for damages against the owners.[46] And a delay in arriving, which made it so late in the season as to prevent the charterer from obtaining insurance, the vessel's agent having represented that she would arrive in time, absolves the charterer.[47]

Quite similar to this was Davison v. Von Lingen.[48] Here the charter party contained a provision that the vessel had "now sailed or about to sail from Benizaf." In fact, she was only one-third loaded, and did not sail for some time. The court held that the charterer could refuse to load her on arrival, and could recover the extra cost of chartering another vessel to carry his cargo. The charter party is given in the opinion.

The statement of a vessel's registered tonnage near the beginning of the usual form of charter party is not necessarily a warranty, but may be mere description. In Watts v. Camors,[49] the description was, "The steamship Highbury,

Sup. Ct. 240, 46 L. Ed. 366; Hills v. Leeds (D. C.) 149 Fed. 878; Leeds v. Hills, 158 Fed. 1020, 85 C. C. A. 489; Hahlo v. Benedict, 216 Fed. 303, 132 C. C. A. 447.

[45] 2 Wall. 728, 17 L. Ed. 768. See, also, Giuseppe v. Manufacturers' Export Co. (D. C.) 124 Fed. 663.

[46] Sanders v. Munson, 20 C. C. A. 581, 74 Fed. 649; Prussia (D. C.) 100 Fed. 484.

[47] Oades v. Pfohl (D. C.) 104 Fed. 998.

[48] 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885.

[49] 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406.

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of the burden of 1,100 tons or thereabouts registered measurement," and there was a provision that she should carry "a full and complete cargo, say about 11,500 quarters of wheat in bulk." The registered tonnage was really 1203, a fact unknown to either party. The court held that the designation of the ship by name and the stipulation as to the cargo negatived the idea that the statement as to tonnage was a warranty, and that the charterers were not justified in refusing to load her.

The John H. Pearson [50] was a fruit charter, in which a vessel from Gibralter to Boston engaged to "take the Northern passage." The court held that this was a term of art, and, if none such was known, she should go through the coolest waters to her destination.

Culliford v. Gomila [51] contains a grain charter party in the report. In it the vessel guarantied to take 10,000 quarters of grain. The charterers, however, did not stipulate any definite day on which she was to enter upon the charter party, or any definite day when she was to commence loading. When loaded she contained only 9,635 quarters, and the parties to whom the charters had sold the full cargo of 10,000 quarters refused to take it, the market having fallen. Afterwards, the ship, by removing more coal and water ballast, took the full amount. The court held that she had fulfilled her contract, and was not liable to the charterers for their loss.

In the Gazelle,[52] the charter party contained a clause that the vessel should be ordered to a "safe * * * port, or as near thereto as she can safely get, and always lay and discharge afloat." The charterers ordered her to a port having a bar at its mouth, which she could not cross, the only

[50] 121 U. S. 469, 7 Sup. Ct. 1008, 30 L. Ed. 979.

[51] 128 U. S. 135, 9 Sup. Ct. 50, 32 L. Ed. 381.

[52] 128 U. S. 474, 9 Sup. Ct. 139, 32 L. Ed. 496. See, also, Carbon Slate Co. v. Ennis, 114 Fed. 260, 52 C. C. A. 146; Manchester Liners v. Virginia-Carolina Chemical Co., 204 Fed. 564, 123 C. C. A. 90.

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anchorage outside the bar being in the open sea. The master refused to go. The court upheld him, and ruled also that evidence of a custom to anchor and discharge outside the bar was inadmissible against the express provisions of the contract.

But such an agreement means that a ship must be able to reach her loading dock without mutilation. A ship with steel masts, which cannot be temporarily lowered in order to enable her to pass under a bridge, is not required to take them down; but the cost of the lightering entailed falls on the charterer.[88]

CONDITIONS IMPLIED IN CHARTER PARTIES OF SEAWORTHINESS AND AGAINST DEVIATION

85. In contracts of charter party there is an implied condition of seaworthiness and against deviation.

Although the language in the forms now in use frequently covers it, yet there are certain conditions implied in a charter party, in the absence of express provisions to the contrary. They are:

1. That the ship is seaworthy.

Charter parties usually contain a provision that the vessel is "tight, stanch, and strong, and in every way fitted for the voyage." This warranty of seaworthiness is a rigid one, and means that the vessel is actually seaworthy, not merely that her owner has done his best to make her so. It applies not only to the beginning of loading, but to the time of sailing as well, and the vessel will be liable for damages caused by unseaworthiness at starting, or by unseaworthiness developing on the voyage from prior causes not covered by exceptions, or from causes which he could repair.

[88] Mencke v. Cargo of Java Sugar, 187 U. S. 248, 23 Sup. Ct. 86, 47 L. Ed. 163.

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In the CALEDONIA,[54] a vessel with a cattle cargo broke her shaft at sea, thereby greatly lengthening the voyage, and causing much loss in their quality. The court held the vessel responsible, though the breakage arose from a latent defect.

In STEEL v. STATE LINE S. S. CO.,[55] a lower port-hole was left insufficiently fastened. Sea water came through and injured the cargo. The court held that if this was the condition at sailing it was a violation of the warranty of seaworthiness. This case is specially instructive.

In Cohn v. Davidson,[56] the vessel was seaworthy when she commenced to load, but unseaworthy when she sailed. The court held that this was a breach of the warranty.

In Worms v. Storey,[57] a vessel which was seaworthy at starting became unseaworthy during the voyage from causes excepted in the contract. But she put into port, where she could have repaired, and did not. She was held liable for a breach of the warranty.

This doctrine applies not only to structural defects, but to deficiencies of equipment, as, for instance, an insufficient supply of coal for the voyage, or insufficient ballast.[58] But if the charterers examine the vessel before chartering her, and accept her, they cannot complain of such defects as they could reasonably have discovered, though they still may complain of latent defects.[59]

The obligation of seaworthiness and fitness for the voyage requires that the vessel is reasonably fit to carry safely

§ 85. [54] 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

[55] 3 A. C. 72.

[56] 2 Q. B. D. 455.

[57] 11 Exch. 427.

[58] Vortigern, [1899] P. 140; Weir v. Steamship Co., [1900] A. C. 525; McIver v. Tate Steamers, Ltd., [1903] 1 K. B. 362.

[59] Waterhouse v. Rock Island Alaska Min. Co., 38 C. C. A. 281, 97 Fed. 466; Sanford & Brooks Co. v. Columbia Dredging Co., 177 Fed. 878, 101 C. C. A. 92.

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and without damage the particular cargo which she undertakes to transport.[60]

This applies, not only to defects which might render the voyage dangerous, but to unfitness to receive or properly care for cargo.[61]

Defects in the refrigerating apparatus are a common example of this.[62]

2. That the vessel will commence and prosecute the voyage with reasonable diligence and without unnecessary deviation.

Charter parties cover this by a stipulation that the vessel, if not at the loading port, shall "at once sail and proceed" thereto, and shall when loaded "proceed with all practicable dispatch." If she fails to do so in the first instance, the charterer may, as decided in the cases of Lowber v. Bangs and Davison v. Von Lingen, above cited, refuse to load her, and have his action for damages. If by excepted perils she is so delayed that the commercial enterprise is frustrated, the charterer may refuse to load her, but in such case he would have no action for damages.[63] If by deviation the charterer suffers loss, he can sue for damages.[64]

The vessel is not obligated to proceed, if, after she starts, conditions arose which would render it probable in the judgment of a prudent master or owner that she would be captured; war being imminent.[65]

[60] Jeanie, 236 Fed. 463, 149 C. C. A. 515.

[61] Church Cooperage Co. v. Pinkney, 170 Fed. 266, 95 C. C. A. 462.

[62] Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65.

[63] Jackson v. Insurance Co., L. R. 10 C. P. 125.

[64] Scaramanga v. Stamp, 5 C. P. D. 295.

[65] Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960.

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CANCELLATION CLAUSE IN CHARTER PARTIES

86. If the vessel does not arrive by the date specified, the charterer may refuse to load, though the delay was due to excepted perils. If she does not arrive within a reasonable time, she is liable for damages, though she arrives before the canceling date.

The ship's first duty is to proceed to the loading port with reasonable diligence. To enforce this obligation, a clause called the "cancellation clause" is inserted. It provides that, if the vessel does not arrive at the loading port ready to load by a given date, all her holds being clear, the charterers may cancel. Under this the charterers may cancel, though the delay was caused by excepted perils.[66]

If the canceling clause is worded as above, she must not only arrive by the canceling date, but she must also be ready for cargo by that date. Her ballast and dunnage must be out, and all the spaces to which the charterer is entitled must be cleared from the effects of former cargoes and ready for use. She must be in such condition as to satisfy the underwriter's inspector and all reasonable requirements for avoiding injury to cargo.[67]

As this clause is for the benefit of the charterer, it does not exempt the ship from her obligation to proceed to the loading port with reasonable dispatch. If she loiters by the

§ 86. [66] Smith v. Dart, 14 Q. B. D. 105.

[67] Groves v. Volkart, 1 C. & E. 309; Crow v. Myers (D. C.) 41 Fed. 806; Stanton v. Richardson, 45 L. J. Ex. 78; Disney v. Furness, Withy & Co. (D. C.) 79 Fed. 810; In re 2,098 Tons of Coal, 135 Fed. 317, 67 C. C. A. 671; L. N. Dantzler Lumber Co. v. Churchill, 136 Fed. 560, 69 C. C. A. 270. But the charterer cannot claim the right to cancel on account of a failure to be ready caused by his obstructive tactics. Bonanno v. Tweedie Trading Co. (D. C.) 117 Fed. 991; Id., 130 Fed. 448, 64 C. C. A. 650.

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wayside, she is responsible to the charterer in damages, though she should arrive before the canceling date.[68]

The clause does not cancel the charter proprio vigore, but merely gives the charterer an option. He must exercise it within the time allowed, or he waives his right.[69]

The charter party usually provides that the vessel can only be ordered to a safe port, where she can lie always afloat. This provision is common both to loading and discharging. It means safely afloat when loaded. Under it a ship is not required to lighter her cargo, or lie at a dangerous anchorage.[70]

LOADING UNDER CHARTER PARTIES

87. Delay beyond the time allowed entitles the ship to demurrage. Sundays and legal holidays are then counted under the ordinary form of charter party.

The charter party provides that the charterers have a certain number of days for loading, Sundays and legal holidays excepted, and must pay demurrage at a certain rate per ton per day if vessel is longer detained. If the clause is worded in this manner, demurrage is payable for Sundays and legal holidays.[71]

Sundays and holidays are excluded in counting the lay days, but included in estimating the demurrage, because in

[68] March (D. C.) 25 Fed. 106; McAndrew v. Adams, 1 Bing. N. C. 29, 27 E. C. L. 297; Heller v. Pendleton (D. C.) 148 Fed. 1014.

[69] W. & C. T. Jones S. S. Co. v. Barnes-Ames Co., 244 Fed. 116, 156 C. C. A. 544.

[70] Gazelle, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. Ed. 496; Shield v. Wilkin, 5 Exch. 304; Alhambra, 6 P. D. 68.

[71] Brown v. Johnson, 10 M. & W. 331; Red "R" S. S. Co. v. North American Transport Co., 91 Fed. 168, 33 C. C. A. 432; Wallace v. Cargo of 292,000 Feet of Pine Boards (D. C.) 224 Fed. 993. But, if the excepted days are actually used, they count in the absence of a contrary agreement. Whittall v. Rathken's Shipping Co. Ltd., [1907] 1 K. B. 783; Branchelow S. S. Co. v. Lamport, [1907] 1 K. B. 787.

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such port work they cannot be used. But demurrage is an allowance for the time during which the ship would otherwise be on a voyage, and, as she does not stop her voyage for Sundays, every day should count. The same reasoning applies to dispatch money, which is an allowance made the charterer for loading in less time than that permitted by the charter.[72]

The term "working days" means a calendar day on which the law permits work to be done. It excludes Sundays and legal holidays, but does not credit the charterer with days when the weather is too bad to work.[73]

In these latter days, a stipulation against strikes has been found quite convenient.[74]

Under lump-sum charters, a fruitful source of controversy is as to the spaces on the ship which the charterer may fill. He is entitled to all spaces where cargo can be put, except the spaces necessary for the crew, coal, tackle, apparel, provisions, and furniture. The variety in the build of vessels renders it impossible to lay down any general rule. A good example of such controversies is Crow v. Myers.[75]

The loading is largely governed by the custom of the port, except where inconsistent with the written contract.[76]

[72] Muirfield (D. C.) 174 Fed. 75; Fargrove Nav. Co. v. Lavino & Co. (D. C.) 191 Fed. 525; Pool Shipping Co. v. Samuel, 200 Fed. 36, 118 C. C. A. 264.

[73] Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650; Wood v. Keyser (D. C.) 84 Fed. 688; Id., 87 Fed. 1007, 31 C. C. A. 358. The proper language for the charterer to use in order to get the benefit of bad weather is "weather working days." Bennetts v. Brown, [1908] 1 K. B. 490.

[74] Marshall v. McNear (D. C.) 121 Fed. 428; Pyman S. S. Co. v. Mexican Central R. Co., 169 Fed. 281, 94 C. C. A. 557; Hulthen v. Stewart, [1902] 2 K. B. 199; [1903] A. C. 389.

[75] (D. C.) 41 Fed. 806. See, also, Kaupanger (D. C.) 241 Fed. 702. But the vessel may carry only so much coal as is reasonably necessary for the voyage. Darling v. Raeburn, [1906] 1 K. B. 572; [1907] 1 K. B. 846.

[76] Moore v. U. S., 196 U. S. 157, 25 Sup. Ct. 202, 49 L. Ed. 428.

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EXECUTION OF NECESSARY DOCUMENTS UNDER CHARTER PARTIES

88. The master must sign the bills of lading and other necessary documents.

Most charter parties require the master to sign bills of lading as presented by the charterer for the different parts of the cargo as received on board, and drafts for the disbursements made by the charterers to pay the vessel's bills when in port, and for the difference between the charter party freight and the freight as per bills of lading. All these are important documents. The amount necessary to clear a single large ship runs up into the tens of thousands. As charterers with a large business may have several on the berth loading at once, the capital necessary for their use would be enormous. Hence these documents are needed by him and his shippers for obtaining discounts from his banker. Thus, a man who sees an opportunity to ship a thousand bales of cotton to Liverpool, where he can sell it at an advance, can buy it on this side, engage freight room from some charterer who has a ship in port or expected, get a bill of lading for it to order, draw on his Liverpool consignee, attaching the bill of lading to the draft, and get his draft at once discounted at his bank.

Under the usage of trade, the freight is payable at the port of discharge, and is collected by the vessel owner. If the charterer has sublet the room to different shippers for more than he has agreed to pay the owner for the use of his ship, the owner will owe him the difference. This is calculated at the loading port on the completion of the loading, and the master gives the charterer a draft on his owners for the amount. If the cargo has started from inland points, and the charterer has to pay accrued charges of previous carriers (for the last carrier pays the charges

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of the previous carriers), the draft may be very great; but, if it all starts from the loading port, so narrow are the margins of profit in modern trade that the draft is small. A recalcitrant captain may be compelled to sign these important papers.[77]

CESSER CLAUSE IN CHARTER PARTIES

89. Under the cesser clause, the settlement between ship and charterer must be made at the loading port, and the shipper looks to the ship alone, and not to the charterer.

A common provision in charter parties is the clause known as the "cesser" clause. Its usual language is "owner to have a lien on the cargo for freight, dead freight, and demurrage, charterer's liability to cease when cargo shipped." It is strictly construed. It does not operate to release the ship, and it releases the charterer from liability for future occurrences alone, not for past occurrences.[78]

The object is to end the charterer's liability at the loading port and save him from a lawsuit at a distant point. To that end the bills of lading are given direct by the ship to the shipper, and all disputes as to demurrage, dead freight, etc., at the loading port, are settled before the vessel sails, while the lien given to the owner protects his freight or

§ 88. [77] Reynolds v. The Joseph, 2 Hughes, 58, Fed. Cas. No. 11,730. See, in general, as to these documents, Kruger v. Moel Tryvan S. S. Co., [1907] A. C. 272; London Transport Co. v. Trechman, [1904] 1 K. B. 635.

§ 89. [78] KISH v. CORY, L. R. 10 Q. B. 553; Iona, 80 Fed. 933, 26 C. C. A. 261; Schmidt v. Keyser, 88 Fed. 799, 32 C. C. A. 121; Crossman v. Burrill, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106; Steamship Rutherglen Co. v. Howard Houlder & Partners, 203 Fed. 848, 122 C. C. A. 166; Elvers v. W. R. Grace & Co., 244 Fed. 705, 157 C. C. A. 153; Seguranca, 250 Fed. 19, 162 C. C. A. 191.

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demurrage at the port of discharge. Hence, if the owner gives the shipper a clean bill of lading at the loading port, he cannot hold the goods for demurrage; for the shipper is not bound by the charter party. He must collect his demurrage, or reserve a lien for it, by proper language, in his bill of lading.[79]

[79] Turner v. Haji, [1904] A. C. 826.

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CHAPTER VIII

OF WATER CARRIAGE AS AFFECTED BY THE HARTER ACT OF FEBRUARY 13, 1893 (27 Stat. 445 [U. S. Comp. St. §§ 8029–8035])

90–91. Policy of Act.
92. Act Applicable Only between Vessel Owner and Shipper.
93. Vessels and Voyages to which Act is Applicable.
94. Relative Measure of Obligation as to Handling the Cargo and Handling the Ship.
95. Necessity of Stipulation to Reduce Liability for Unseaworthiness.

POLICY OF ACT

90. The act materially modifies the law relating to the carriage of goods.

91. It forbids any stipulation against negligence in preparation for the voyage or in delivery, or unseaworthiness below the measure of due diligence.

The discussion in the preceding chapter has been as to the liability of carriers under the general decisions of the courts, independent of statute. As has been seen, stipulations against negligence are forbidden by the preponderance of American decisions, but allowed by the English decisions. As a large proportion of the foreign carrying trade is conducted in English vessels, the effect of the English decisions is to allow vessel owners to fritter away their liability by stipulation, and this placed American vessel owners at a disadvantage in the close competition between them. The Harter Act was a compromise between the shipping and carrying interests, and though it exempts carrying vessels from liability for many acts of negligence for which they were responsible formerly, and against which they could not stipulate, it at the same time works in favor of the shipper by forbidding many stipulations which under

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the English law were valid. The general policy of the law is that the vessel owner must take the care required of experts in that business in all matters relating to the loading, stowage, custody, care, and proper delivery of the goods intrusted to it, and must exercise due diligence to make the vessel seaworthy in all the particulars which have been held to constitute seaworthiness; and that, if these requirements are met entirely, neither the vessel nor her owners shall be responsible even for faults or errors in navigation, nor for many such grounds of liability as have been held by the American decisions to be validly stipulated against in bills of lading.

The full text of the act is as follows:

"Chapter 105. An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words and clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to ex-

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ercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

"Sec. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to issue to shippers of any lawful merchandise a bill of lading or shipping document, stating, among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

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"Sec. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the government of the United States.

"Sec. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statutes defining the liability of vessels, their owners or representatives.

"Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

"Sec. 8. This act shall take effect from and after the first day of July, eighteen hundred and ninety-three. Approved February 13, 1893."[1]

ACT APPLICABLE ONLY BETWEEN VESSEL OWNER AND SHIPPER

92. The act is intended only to regulate the relations between vessel and shipper, and not to affect the relations of either to third parties.

In referring to the act generally, it is first to be observed, when the title and all of its provisions are taken together, that it is only intended to affect the relations between ves-

[1] 27 Stat. 445 (U. S. Comp. St. §§ 8029–8035).

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sel owner and shipper. Accordingly in the DELAWARE [2] which was a case of a collision between two vessels, in which the wrongdoing vessel claimed that the general language of the third section of the act exempted it from liability to the other vessel, the court held that such was not its intention; that it was not intended to affect the relations of any other parties than shipper and carrier.

Under the principle of this decision, the owner of a tug cannot claim exemption under the third section of the act for negligent towage by which cargo on a barge in its tow was injured, though the owner of the tug was pro hac vice owner of the barge and it was his contract of carriage, the act applying only to the cargo and the vessel on which it was laden.[3]

As to the policy of the act, the Supreme Court in its opinion used the following language: "It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair, and outfit of the vessel, and the care and delivery of the cargo. The act was an outgrowth of attempts, made in recent years, to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and other forms of liability, which had been held by the courts of England, if not of this country, to be valid as contracts, and to be respected even when they exempt the ship from the consequences of her own negli-

§ 92. [2] 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

[3] Murrell (D. C.) 200 Fed. 826, affirmed 195 Fed. 483, 115 C. C. A. 393.

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gence. As decisions were made by the courts from time to time, holding the vessel for nonexcepted liabilities, new clauses were inserted in the bills of lading to meet these decisions, until the common-law responsibility of carriers by sea had been frittered away to such an extent that several of the leading commercial associations, both in this country and in England, had taken the subject in hand, and suggested amendments to the maritime law in line with those embodied in the Harter act. The exigencies which led to the passage of the act are graphically set forth in a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury, and embodied in a report of the committee on interstate and foreign commerce of the house of representatives."

In the Irrawaddy,[4] the court uses the following language in reference to the purpose of the act: "Plainly, the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence, and, in the event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel. But can we go further, and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship? Doubtless, as the law stood before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in the officers and crew, because such a contract was held by the federal courts to be contrary to public policy, and, in this particular, the owners of American vessels were at a disadvantage, as compared with the owners of foreign vessels, who can contract with shippers

[4] 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130.

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against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American shipowner, and Congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty. Although the foundation of the rule that forbade shipowners to contract for exemption from liability for negligence in their agents and employés was in the decisions of the courts that such contracts were against public policy, it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared."

This case also illustrates the doctrine that the act was not intended to affect the rights of the vessel to third parties. The vessel had met with a disaster from some fault in navigation of her crew, and the vessel owner contended that, as he was no longer liable under the act for the negligence of his crew in this respect, he ought to be entitled to recover against the cargo owner in general average for such loss. The Supreme Court, however, held that it did not give him the right to assert a claim for general average against the cargo arising out of the negligence of his own crew.

But, though he cannot assert such claim in the absence of special agreement, the act shows such a change of policy that he is allowed by special agreement to stipulate that he shall have a right to make such a claim.[5]

[5] Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969. The material sections of the act are printed in a note to this case. The opinion

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The tendency is to construe the statute strictly.[6] Hence it does not apply to stipulations in a charter party regulating the rights of owner and charterer and not connected with the relation between shipper and carrier.[7]

Nor was the act intended to apply to any but carriers of goods. Passenger carriers are not affected by it.[8]

VESSELS AND VOYAGES TO WHICH ACT IS APPLICABLE

93. The test as to vessels which come under this act is not based upon their nationality, but upon their voyages.

In the first two sections, the voyages covered by the act are those between ports of the United States and foreign countries, and, if the voyage in question is between these ports, the act applies both to American and foreign vessels.[9]

by Mr. Justice Pitney gives a clear analysis and explanation of the act.

[6] Benner Line v. Pendleton, 217 Fed. 497, 505, 133 C. C. A. 349; Compagnie Maritime Francaise v. Meyer, 248 Fed. 881, 885, 160 C. C. A. 639.

[7] Lake Steam Shipping Co. v. Bacon (D. C.) 137 Fed. 961; Id., 145 Fed. 1022, 74 C. C. A. 476; Golcar S. S. Co. v. Tweedie Trading Co. (D. C.) 146 Fed. 563.

[8] Moses v. Hamburg-American Packet Co. (D. C.) 88 Fed. 329; Id., 92 Fed. 1021, 34 C. C. A. 687; New England (D. C.) 110 Fed. 415, 418; California Nav. & Imp. Co., In re (D. C.) 110 Fed. .678. These cases exclude from the scope of the statute personal injuries to passengers and injuries to baggage carried as such. In Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190, the question was incidentally involved. The court, while holding that the statute did not cover the specific case, decided that the statute would apply if the passenger was compelled to send his baggage as freight by reason of a regulation of the carrier as to valuation.

§ 93. [9] Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801; Knott v. Botany Worsted Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90; Tampico (D. C.) 151 Fed. 689.

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These sections, therefore, in the cases to which they applied, put American and foreign vessels on an equality; but it was necessary to go further than this. Had the law stopped at that point, American vessels in foreign ports would have had an advantage over American vessels in the coasting trade, as the latter could not have stipulated against liability. Hence the third section, which exempts vessels from negligence in navigation and from liability, irrespective of negligence, for perils of the sea and other particulars which common carriers could stipulate against, applies not only to voyages between American and foreign ports, but to all voyages from American ports, even though to other American ports.[10]

RELATIVE MEASURE OF OBLIGATION AS TO HANDLING THE CARGO AND HANDLING THE SHIP

94. The carrier is liable for negligence in connection with the handling of the cargo, whether during loading, during the voyage, or during unloading, and cannot protect himself against such negligence by stipulation.

On the other hand, the statute proprio vigore exempts him from the consequences of negligent navigation (against which he could not have contracted under American law), and from other grounds of liability (against which he could have contracted under American law), if he exercises due diligence to furnish a seaworthy vessel.

Stipulations not falling under the prohibitions of the act which were valid before are still permissible.

[10] E. A. Shores, Jr. (D. C.) 73 Fed. 342; In re Piper Aden Goodall Co. (D. C.) 86 Fed. 670; Nettie Quill (D. C.) 124 Fed. 667.

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The main questions under the act have arisen in connection with the first three sections. Its general scheme is to make the vessel liable for faults in connection with the ordinary shipment and stowage of the cargo, but to exempt her from liability for negligence in navigation after the voyage commences.

The distinction between acts connected with handling the cargo and those connected with handling the ship is a close one, and has given rise to many decisions,

In Calderon v. Steamship Co.,[11] a vessel on a voyage from New York to certain West India ports put some goods designed for one port in a compartment beneath goods designed for a second port. Hence, when she reached the first port, the goods could not be found, and were carried past their destination. At the second port they were found, but the vessel came back on her trip to New York, and the goods were lost. The court held that this was not a fault of navigation, but a fault in proper delivery, and that, therefore, the vessel was liable, and the bill of lading could not stipulate against such an act.

In the Frey,[12] some glycerine was so loosely stowed that it rolled around in rough weather, and injured the other cargo. The vessel was held liable.

In the Kate,[13] the crew, while loading in port, left out several stanchions, intended to support part of one of the decks, and piled up on the remaining stanchion an unusual load, and the vessel was in this condition when she sailed. The court held that this was not a fault in navigation, and that the vessel was liable.

In the Colima,[14] the vessel was so loaded that she was

§ 94. [11] 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033. See, also, Gulden v. Hijos, 252 Fed. 577, 164 C. C. A. 493.

[12] (D. C.) 92 Fed. 667. See, also, Dunbritton, 73 Fed. 352, 19 C. C. A. 449.

[13] (D. C.) 91 Fed. 679.

[14] (D. C.) 82 Fed. 665. Cases of this character are numerous. Germanic, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610; Oneida, 128

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crank in bad, though not extraordinary, weather. She was held liable.

In the Whitlieburn,[15] it was held that properly ballasting the ship was connected with the loading, and not the navigation, and that the vessel was liable for any injury caused by failing to attend to this.

In the Niagara,[16] a vessel which went to sea with a defective mechanical horn was held not properly equipped (or seaworthy in the technical sense), and therefore that she was liable to the cargo for any damage caused thereby.

A competent master and sufficient crew are parts of the requirement of seaworthiness, but a negligent act of the master is not of itself proof of incompetency.[17]

Some narrow distinctions have been drawn in reference to the refrigerating apparatus of modern vessels. If the apparatus is defective, the carrier is not protected by the Statute.[18]

If, on the other hand, the apparatus is sufficient, but is carelessly used, that is a fault in navigation, and the carrier is protected.[19]

The statutory exemption from faults of navigation does not come into effect until the voyage has actually begun.[20]

As the exemption from liability for faults of navigation

Fed. 687, 63 C. C. A. 239; Steamship Wellesley Co. v. Hooper, 185 Fed. 733, 108 C. C. A. 71; Ingram & Royle, Ltd., v. Services Maritimes, [1913] 1 K. B. 538.

[15] (D. C.) 89 Fed. 526. So as to dunnage. Earnwood (D. C.) 88 Fed. 315.

[16] 28 C. C. A. 528, 84 Fed. 902.

[17] Cygnet, 126 Fed. 742, 61 C. C. A. 348; Hanson v. Haywood, 152 Fed. 401, 81 C. C. A. 527.

[18] Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65; Nelson v. Nelson Line, [1907] 1 K. B. 769; [1908] A. C. 16.

[19] Rowson v. Transport Co. [1903] 1 K. B. 114; 2 K. B. 666.

[20] Steamship Wellesley Co. v. Hooper, 185 Fed. 733, 108 C. C. A. 71; Gilchrist Transp. Co. v. Boston Ins. Co., 223 Fed. 716, 139 C. C. A. 246.

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is given on condition that the carrier will exercise due diligence to make his vessel seaworthy, the burden to prove compliance with this condition is on the carrier.[21]

Some of the nicest questions in connection with the act have arisen in reference to the proper management of her portholes. The question as to responsibility for leaving a porthole open or insecurely fastened at sailing depends largely upon its location, and upon the question whether harm could reasonably be expected to come from leaving it open.

In the Silvia,[22] a porthole was knowingly left open by the crew at the time of the vessel's sailing, and care was taken not to block it by cargo, so that in case of necessity, when the vessel went to sea, it could have been easily closed. The porthole itself was without defect. At sea the crew forgot to close it, and some of the goods were injured. The court held that this was a fault of navigation, and did not render the vessel unseaworthy.

On the other hand, in the Manitoba,[23] a porthole was unintentionally left insecure at the time of sailing. Judge Brown held that this was a fault connected with the ordinary loading, and was not an act of navigation, and that the ship was liable. It is commended as an interesting discussion of the difference between the two cases.

In the English case of Dobell v. Steamship Rossmore Co.,[24] the porthole was not only left open, but cargo was packed against it, so that it could not have been closed at sea. The court held that under these circumstances it was a fault in loading, and not in navigation, and that the vessel was liable.

[21] Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794; R. P. Fitzgerald, 212 Fed. 678, 129 C. C. A. 214.

[22] 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. See, also, Tenedos (D. C.) 137 Fed. 443; 151 Fed. 1022, 82 C. C. A. 671.

[23] (D. C.) 104 Fed. 145. See, also, International Navigation Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830.

[24] [1895] 2 Q. B. 408.

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The vessel which is so stowed that she is down by the head, causing the cargo to run forward, is liable for the consequences.[25]

On the other hand, where water ballast in being pumped out injured the cargo, owing to the fact that the crew in pumping negligently left a valve open, the machinery itself being in perfect order, this was held a fault in navigation, and the vessel was not liable.[26]

And lack of attention to the vessel's pumps while on a voyage, by which cargo was injured, the pumps themselves being in good order, is a fault in navigation, for which the vessel is not liable under the act.[27] Breaking adrift and causing damage to cargo, because the pilot anchored the vessel in a bad place, was a fault of navigation, for which the ship was not liable.[28]

So a vessel which was injured on a voyage, and taken to an intermediate port for repairs, was not liable for subsequent damage from the failure to make the repairs sufficiently extensive, owing to a lack of judgment of the master.[29]

[25] Botany Worsted Mills v. Knott (D. C.) 76 Fed. 582; Id., 82 Fed. 471, 27 C. C. A. 326; Knott v. Botany Worsted Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90. But tipping the ship by the master, not in connection with the discharge of the cargo, but in order to examine the propeller is a fault in navigation. Indrani, 177 Fed. 914, 101 C. C. A. 194.

[26] Mexican Prince (D. C.) 82 Fed. 484; Id., 91 Fed. 1003, 34 C. C. A. 168. See, also, Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794; American Sugar Refining Co. v. Rickinson, 124 Fed. 188, 59 C. C. A. 604.

[27] British King (D. C.) 89 Fed. 872; Id., 92 Fed. 1018, 35 C. C. A. 159.

[28] Etona, 71 Fed. 895, 18 C. C. A. 380.

[29] The Guadeloupe (D. C.) 92 Fed. 670; Corsar v. Spreckels, 141 Fed. 260, 72 C. C. A. 378; U. S. v. New York & O. S. S. Co., 216 Fed. 61, 132 C. C. A. 305.

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Validity of Stipulations Not Mentioned in the Act

Stipulations not covered by the terms of the statute, which were valid under American law before the act, are unaffected by it.

A stipulation against thieves is valid.[80]

So as to a stipulation against strikes.[81]

So a stipulation as to a substituted delivery at the quay or into hired lighters.[82]

So a stipulation limiting the value, provided the shipper is left free to declare the true value.[83]

NECESSITY OF STIPULATION TO REDUCE LIABILITY FOR UNSEAWORTHINESS

95. The act permits the shipowner to reduce his warranty of seaworthiness to the measure of reasonable diligence by proper stipulations, but does not have this effect proprio vigore.

Probably the most interesting case that has been decided so far upon the act is the CARIB PRINCE.[84] There, a defective rivet which had existed from the very construction of the ship, and was not discoverable by the utmost care, caused by leakage a damage to the cargo. Under the decisions relating to seaworthiness independent of the act, this was a latent defect, and the owner was solely responsible under his implied warranty of seaworthiness. The vessel owner asserted exemption, first, on the ground that

[80] Cunard S. S. Co. v. Kelley, 115 Fed. 678, 53 C. C. A. 310.

[81] Toronto (D. C.) 168 Fed. 386.

[82] Portuguese Prince (D. C.) 209 Fed. 995.

[83] Hohl v. Norddeutscher Lloyd, 175 Fed. 544, 99 C. C. A. 166; Kuhnhold v. Compagnie Générale Transatlantique (D. C.) 251 Fed. 387.

§ 95. [84] 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181. See, also, Indrapura, 190 Fed. 711, 112 C. C. A. 351.

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his bill of lading contained a clause against such unseaworthiness, by which he was released from liability; and, second, he contended that the language of the Harter act itself, even if the bill of lading did not mean what he said, exempted him from every defect in the vessel not discoverable by due diligence. The Supreme Court, however, held, as to the first point, that his bill of lading, properly construed, was not intended to cover defects in the vessel existing at the time of sailing, but only those subsequently arising. In reference to his second defense, it held that the act did not, by force of its own language, reduce the liability for unseaworthiness to the measure of due diligence, when no contract was made, but merely gave the vessel owner the right, by contract properly worded, to so reduce his liability. Hence it held the vessel liable under his implied warranty of seaworthiness, independent of the statute, as he had not by contract protected himself against it.

Recapitulation

The act is a compromise between the interests of shipper and carrier, and was intended, in the interests of American shipping, to put the American carrier on an equality with the foreign carrier.

The first section forbade any stipulation against negligence in connection generally with the handling of the cargo.

The second section allowed the carrier to reduce his former absolute warranty of seaworthiness to the measure of due diligence, provided he so stipulated, but did not do this proprio vigore for him.

It allowed a similar stipulation as to the handling of the cargo.

The third section of its own force exempted the carrier from liability for faults in navigation, sea perils, acts of God or public enemies, inherent vice in thing carried, insufficiency of package, legal process, and deviation, provided the carrier showed due diligence as to seaworthiness in case he wished to set up any of these defenses.

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CHAPTER IX

OF ADMIRALTY JURISDICTION IN MATTERS OF TORT

96–97. The Waters Included, and Wharves, Piers, and Bridges.
98. Torts, to be Marine, must be Consummate on Water.
99. Torts may be Marine though Primal Cause on Land.
100. Detached Structures in Navigable Waters.
101. Torts Arising from Relation of Crew to Vessel or Owner.
102. Personal Torts Arising from Relation of Passengers to Vessel.
103. Obligations to Persons Rightfully on Vessel, but Bearing no Relation to It.
104. Liability as between Vessel and Independent Contractor.
105. Doctrine of Imputed Negligence.
106. Miscellaneous Marine Torts.
107. Doctrine of Contributory Negligence.

THE WATERS INCLUDED, AND WHARVES, PIERS, AND BRIDGES

96. The test of jurisdiction in matters of tort is the locality.

97. This includes navigable waters, natural and artificial, in their average state, but does not include wharves, piers, or bridges attached to the shore.

We have already seen that the test of jurisdiction in matters of tort is the locality, and therefore we must first consider what is meant by this test, and what waters it includes; and we must then take up the various torts cognizable in admiralty. They may be subdivided into torts to the person and torts to property; and torts to the person may be further subdivided, for convenience of discussion, into torts not resulting in death and those resulting in death.

The admiralty jurisdiction in matters of tort exists over all navigable waters, as explained in a previous connec-

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tion.[1] This includes canals.[2] But it includes only navigable waters in their usual state. For instance, a stream that is navigable at ordinary tides is none the less within the jurisdiction because it happens to be bare at an unusually low tide; and, conversely, when a navigable river is widened by freshets far beyond its usual banks, and overspreads the adjoining country on either side, it does not carry admiralty jurisdiction with it. Hence, in the Arkansas,[3] a steamer which, during a flood, was far out of the regular channel, and collided with a house, which was usually inland, was held to have committed no marine tort.

There is a conflict of authority on the question whether an injury received in a dry dock while the water is pumped out comes under the cognizance of the admiralty. In the Warfield[4] Judge Thomas held that a workman who fell through the open hatch of a ship while in a dry dock had no remedy in admiralty.

On the other hand, in the Anglo-Patagonian it was held that there was such remedy in the case of injury to workmen who were injured by the falling of the anchor from a ship while in dry dock, though they were not even aboard the ship, but were on a staging erected for the purpose of enabling them to work outside the ship. They were employed by the dry dock company which had a contract for repairing the ship.[5]

§§ 96–97. [1] Ante, p. 10.

[2] Ex parte Boyer, 109 U. S. 629, 3 Sup. Ct. 434, 27 L. Ed. 1056.

[3] (D. C.) 17 Fed. 383. The decision could have been rested on the fact that the injury complained of was by the ship to a permanent structure, and not by the structure to the ship; but the judge also discusses the question stated in the text.

[4] (D. C.) 120 Fed. 847.

[5] 235 Fed. 92, 148 C. C. A. 586. In the judgment of the author, the doctrine that such an injury does not come under the jurisdiction of the admiralty rests upon the better principle. No refinement of distinction can make a dry dock without any water in it navigable. No decision of any court can change a stubborn fact. At most, a

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The line is narrow between the navigable waters and structures extended from the land over or under them. Anything that is attached to the shore, although the water may be beneath it, is considered as a projection of the shore, and torts happening upon such structures are not within the jurisdiction of the admiralty.

In the Professor Morse,[6] a marine railway attached to the shore projected out into navigable water; that portion which was intended to raise ships being under water. A passing schooner injured this portion. The owner of the

dry dock would be analogous to the space between high and low water mark. Under the English classics the common law and the admiralty had a divisum imperium as to such space; the common law when the tide was out, and the admiralty when the tide was in. Sir Henry Constable's Case, 5 Co. Rep. 107, 77 Eng. Reprint, 218; Finch, Law Discourses, bk. 2, c. 1; 1 Black. Com. 110.

The cases cited by the court are distinguishable. The first is Perry v. Haines, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73. It was a contract, not a tort, case, and it is well known that the test as to jurisdiction in contract cases is their nature, not their locality. The next is Simons v. Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907. It was a claim for a salvage service rendered to a ship in dry dock, which certainly had no characteristics of a tort. In the very last paragraph of the opinion the court carefully limits it to salvage cases. The next is Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. It was a claim for an injury received on board a ship which was afloat on navigable waters, and the court takes care to state this fact in its opinion. The last is the Raithmoor, 241 U. S. 166, 36 Sup. Ct. 514, 60 L. Ed. 937. It was a libel for an injury inflicted on a detached structure surrounded by navigable water. The court emphasizes the fact that it was attached to the land only at the bottom, and not in any way to the shore.

In the Mecca, [1895] P. 95, 107, Lindley, J., says: "An artificial basin or dock excavated out of land, but into which water from the high seas could be made to flow, would not, I apprehend, be in any sense part of the high seas, whether such basin or dock were in this country or any other."

[6] (D. C.) 23 Fed. 803.

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railway libeled the schooner, but the court dismissed the libel for want of jurisdiction.

The preponderance of authority in the trial courts is in favor of the jurisdiction in case of injury to submarine cables, though they are attached to the shore at each end.[7]

But it is hard to draw any distinction between such injuries and that complained of in the Poughkeepsie.[8] Here the injury was to certain structures in use in boring into the bed of the river for the purpose of laying water pipes under the river, which were to supply New York City with water. The court denied the jurisdiction.

Injuries to a wharf, or bridge, or pier by a vessel running into it cannot be recovered in admiralty, as they are considered to have happened on land.[9]

In the Haxby,[10] a vessel collided with a pier, and knocked into the water property of some value, which fell on account of the injury to the wharf. It was held that, though this property, after the injury to the wharf, fell into what otherwise would constitute navigable water, that did not bring the case into the jurisdiction of the admiralty courts.

If a ship is injured by the negligence of a bridge owner, as by failure to open a draw in time, the vessel owner may sue the bridge owner in personam in the admiralty, since the vessel is a floating structure, and the injury, though it commenced on the land, was consummate on navigable waters.[11]

[7] Postal Telegraph Cable Co. v. P. Sanford Ross, Inc. (D. C.) 221 Fed. 105; U. S. v. North German Lloyd (D. C.) 239 Fed. 587; Toledo (D. C.) 242 Fed. 168.

[8] (D. C.) 162 Fed. 494; Phœnix Const. Co. v. Poughkeepsie, 212 U. S. 558, 29 Sup. Ct. 687, 53 L. Ed. 651.

[9] Neil Cochran, Fed. Cas. No. 7,996; Cleveland, T. & V. R. Co. v. Cleveland S. S. Co., 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215; Martin v. West, 222 U. S. 191, 32 Sup. Ct. 42, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592.

[10] (D. C.) 94 Fed. 1016; Id., 95 Fed. 170.

[11] Zeta, [1893] A. C. 468; Panama R. Co. v. Napier Shipping Co.,

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For the same reason injuries inflicted upon a ship by defects in the wharf or dock are within the maritime jurisdiction, and the wharfinger may be sued in personam to recover damages occasioned thereby.[12]

This right of the vessel owner, however, is limited to a suit in personam against the wharfinger or bridge owner. Such a structure is not a maritime instrument, cannot be the subject of a maritime lien, and cannot be liable in rem.[13]

In England admiralty can take jurisdiction of suits for injuries to wharves or piers. This is due to the language of Act 24 Vict. c. 10, § 7, which gives jurisdiction "over any claim for damage done by any ship." [14]

TORTS, TO BE MARINE, MUST BE CONSUMMATE ON WATER

98. In order for a tort to be within the jurisdiction of the admiralty, it must be consummate on navigable water. The fact that it commences upon the water does not give jurisdiction if the injury itself was inflicted on the shore.

In the leading case of the PLYMOUTH,[15] a ship lying at a wharf caught on fire, and the fire communicated to buildings on the shore. The owner of the buildings con-

166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004; O'Keefe v. Staples Coal Co. (D. C.) 201 Fed. 131; Dorrington v. Detroit, 223 Fed. 232, 138 C. C. A. 474.

[12] Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756.

[13] IN RE ROCK ISLAND BRIDGE, 6 Wall. 213, 18 L. Ed. 753.

[14] Uhla, L. R. 2 A. & E. 29, note 3; Boak v. The Baden, 8 Can. Ex. 343.

§ 98. [15] 3 Wall. 20, 18 L. Ed. 125. The question whether the right of action for a death caused by an injury received on navigable waters, but where the injured party does not die till carried ashore, should logically be discussed in this connection, but for convenience will be discussed in the next chapter, post, p. 234.

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tended that the vessel owner, or his agent, was negligent in the origin of the fire, and sued the owners of the ship in admiralty for the damages caused. The court held that, as the right of action was not complete until the buildings were injured, and as the buildings were a part of the shore, and therefore the injury was inflicted upon the shore, there was no jurisdiction.

This principle was afterwards applied in EX PARTE PHENIX INS. CO.[16]

In Johnson v. Chicago & P. Elevator Co.,[17] the jib boom of a schooner, which was being docked at a wharf, and which projected over the wharf, struck a warehouse on the wharf, and did great damage. A libel to recover these damages was dismissed for want of jurisdiction.

In the Mary Stewart,[18] a ship was loading cotton, which was being carried aboard by slings while the ship was lying alongside the wharf. One of the bales fell while being hoisted aboard and before it crossed the ship's rail, and injured a workman standing on the wharf. He libeled the ship for damages, but the court held that admiralty had no jurisdiction.

In the H. S. Pickands,[19] a workman on a ladder which rested on the wharf, and extended up the ship's side, was injured by its slipping. The court denied its jurisdiction.

The distinction is close in case of persons attempting to board or leave vessels at wharves. In the Albion [20] juris-

[16] 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274.

[17] 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 477. The damage consisted in knocking a hole in the warehouse, by which a quantity of corn stored therein ran into the water. The suit was for the corn so lost, not for the damage to the building. Yet the court denied the jurisdiction, though the cause of action, at least as to the loss of the corn, was consummate on navigable waters. The part of the opinion devoted to the question is short, and contains no discussion.

[18] (D. C.) 10 Fed. 137. See, also, Bee (D. C.) 216 Fed. 709.

[19] (D. C.) 42 Fed. 239.

[20] (D. C.) 123 Fed. 189.

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diction was denied in case of a man who fell from a wharf in attempting to board a vessel, never having reached the vessel. And in Gordon v. Drake [21] jurisdiction was decided not to be in the admiralty where a man tried to jump from a vessel to a wharf. He alighted on the wharf, but was injured in doing so.

In Bain v. Sandusky Transp. Co.,[22] seamen who had left their ship were arrested ashore as deserters. They sued in admiralty for a false arrest, but the court held that there was no jurisdiction.

TORTS MAY BE MARINE, THOUGH PRIMAL CAUSE ON LAND

99. The converse of the above proposition is also true—that, where the injury is consummate on the ship, admiralty has jurisdiction, though its primal cause was on the land.

In Hermann v. Port Blakely Mill Co.,[23] a laborer working in the hold of a vessel was injured by a piece of lumber sent down through a chute by a person working on the pier. It was held that admiralty had jurisdiction of such an action.

In the Strabo,[24] a workman attempted to leave a ship by a rope on the ship, which was not securely fastened. In consequence, he fell, being partly injured before he struck the dock, but mainly by striking the dock. Judge Thomas, in an opinion reviewing and classifying the authorities, upheld the jurisdiction on the ground that the ladder was on the ship, the man himself was on the ship when he started in his fall, that there was some injury before he struck the

[21] 193 Mich. 64, 159 N. W. 340.
[22] (D. C.) 60 Fed. 912.
§ 99. [23] (D. C.) 69 Fed. 646.
[24] (D. C.) 90 Fed. 110; Id., 98 Fed. 998, 39 C. C. A. 375.

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ground, and that a mere aggravation of the injury after he struck the ground did not prevent the jurisdiction from attaching. On appeal his decision was affirmed.

The line between these cases and those of the type of the Haxby [25] is a delicate one. As Judge McPherson well said in the Haxby, refinement is unavoidable when we are dealing with questions on the border line between two jurisdictions.

The result may be summed up by the statement that, if a complete cause of action arises from the accident on land, the fact that it is aggravated or the measure of recovery increased on navigable water does not confer jurisdiction on the admiralty. And the converse is true as to causes of action originating on a ship.

DETACHED STRUCTURES IN NAVIGABLE WATERS

100. Detached piers, piles, or structures attached to the bottom, but surrounded by water, are within the jurisdiction.

The principle that wharves, bridges, and piers are parts of the shore applies to those which are attached directly or intermediately through others to the bank or shore line. But piles and structures attached to the bottom and surrounded by water are within navigable waters, and it has long been held that admiralty has jurisdiction of suits for injuries inflicted by them. On principle it ought also to have jurisdiction of suits for injuries received by them, as they can hardly be considered extensions of the shore, but this has been settled only recently.

In Philadelphia & Havre de Grace Steam Towboat Co. v. Philadelphia, W. & B. R. Co.,[26] a pile driven in a channel

[25] (D. C.) 94 Fed. 1016; (D. C.) 95 Fed. 170.

§ 100. [26] Fed. Cas. No. 11,085; Philadelphia W. & B. R. Co. v.

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of a navigable river inflicted injuries upon a tug navigating the river. It was held that this cause of action was cognizable in the admiralty.

In ATLEE v. NORTHWESTERN UNION PACKET CO.,[27] a pier erected in a navigable stream, and unlawfully obstructing navigation, inflicted injuries upon a barge navigating the river. The court held that jurisdiction attached in such case.

There are many instances of suits for damages caused by sunken anchors or wrecks attached to the bottom.[28]

On the other hand, the converse of this, that the admiralty has jurisdiction also of suits for injuries received by such structures, has been settled by two recent Supreme Court cases. In the Blackheath [29] jurisdiction was sustained of a suit for injuries inflicted by a ship on a detached lighthouse surrounded by navigable water, or a "bug" lighthouse as it is usually called.

And in the Raithmoor [30] the same principle was applied to the structure in use during the construction of such a beacon.

In England it has been decided that suits for damage done by ships to oyster grounds under navigable waters are within the jurisdiction, but the decision turns somewhat on the language of their statute.[31]

Philadelphia & H. de G. Steam Towboat Co., 23 How. 209, 16 L. Ed. 433. See, also, State of Maryland v. Miller, 194 Fed. 775, 114 C. C. A. 495; Evans v. Western Timber & Logging Co. (D. C.) 201 Fed. 461.

[27] 21 Wall. 389, 22 L. Ed. 619. See, also, Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004.

[28] Utopia, [1893] A. C. 492; Ball v. Berwind (D. C.) 29 Fed. 541; Snark, [1900] P. 105.

[29] 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236.

[30] 241 U. S. 166, 36 Sup. Ct. 514, 60 L. Ed. 937.

[31] Swift, [1901] P. D. 168.

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TORTS ARISING FROM RELATION OF CREW TO VESSEL OR OWNER

101. 1. For injury by accident the seaman is entitled to no monetary indemnity in the nature of damages.
2. For injury from negligence, there is likewise no right to such indemnity, unless such negligence constitutes a breach of some contractual duty.
3. For injury intentionally inflicted, there is likewise no right to such indemnity, unless it is a breach of some contractual duty or an act by the offender within the scope of his employment.
4. For injury received in the service of the ship, the seaman is entitled to "maintenance and cure" in the absence of wilful misconduct.
5. The liability is in rem and in personam, except in case of assaults; where it is in personam only.

Admiralty has its own doctrines as to the relative rights and obligations of shipowner and crew, dating back to its early classics and growing out of the peculiar nature of the service. The black letter is a summary.[22]

This is the doctrine, irrespective of recent legislation. How far it is affected by such legislation will appear later.

Injuries by Accident

Regardless of any question of negligence short of a willful misconduct on either side, a seaman has no right of action sounding in damages for such injuries, but only a right

[22] This summary is taken almost verbatim from an article by Mr. Fitz-Henry Smith, Jr., of Boston, entitled "Liability for Injuries to Seamen," and published in 19 Harvard Law Review, 418. In fact this section of the main text is hardly more than a condensation of this excellent and accurate article, bringing it down to date and showing the changes wrought by recent legislation. The article was published in 1906.

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to proper treatment, as far as the conditions admit, looking to his cure.[33]

Injuries Resulting from Negligence

The seaman cannot recover beyond maintenance and cure for negligence in navigation or for any act of the master or crew not in performance of a personal duty of the owner.[34]

The best known duty of the master is the obligation to furnish reasonably safe appliances. This is a contractual duty to a seaman, and while analogous to a similar common-law duty of the master to an employee, it did not spring from it but from the admiralty law.

For a breach of this duty, the owner is liable, not only for maintenance and cure, but for compensatory damages.[35]

Another personal duty of the owner is imposed by various statutes in connection with food and medicines needed for the outfit of a ship while in service. These are too numerous to permit discussion in detail. For a failure to comply with them the seaman can recover damages beyond maintenance and cure.[36]

Intentional Injuries

The better opinion is that one of the contractual duties both of the owner and master is a general duty of protecting the seaman from cruelty or ill usage.[37]

[33] Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; Dougherty v. Thompson-Lockhart Co. (D. C.) 211 Fed. 224; Bouker No. 2, 241 Fed. 831, 154 C. C. A. 533; Sorensen v. Alaska S. S. Co. (D. C.) 243 Fed. 280; Id., 247 Fed. 294, 159 C. C. A. 388.

[34] C. S. Holmes (D. C.) 212 Fed. 525; Id., 220 Fed. 273, 136 C. C. A. 289; Tropical Fruit S. S. Co. v. Towle, 222 Fed. 867, 138 C. C. A. 293.

[35] Tonawanda Iron & Steel Co. in re (D. C.) 234 Fed. 198; Themistocles, 235 Fed. 81, 148 C. C. A. 575; Globe S. S. Co. v. Moss, 245 Fed. 54, 157 C. C. A. 350.

[36] Rence (D. C.) 46 Fed. 805; T. F. Oakes (D. C.) 82 Fed. 759; Edward R. West (D. C.) 212 Fed. 287; Silver Shell (D. C.) 255 Fed. 340.

[37] 19 Harvard Law Rev. 427, 433, 434.

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This necessarily includes liability for the personal act of the master, or of the mate while acting as master.[38]

But it should not impose any liability for a single act of violence by an officer out of the line of his duty, or by another seaman at all.[39]

Duty of Maintenance and Cure

Though the owner is not liable beyond maintenance and cure, where there has been no breach of his personal duties, he is liable also for any failure to properly perform this duty, and there is also a liability in rem.[40]

The word "cure" in this connection is probably used in the sense of the Latin word from which it is derived; that is, "care." [41] It could not possibly impose the duty of complete restoration to health.

This doctrine imposes the duty of sending for a physician if the ship is in reach of one; and if the seaman's condition requires it while the ship is on a voyage, it imposes the duty on her to put into port, if one is reasonably accessible.[42]

In spite of the fact that the courts constantly use the expression "fellow servant" in discussing these questions, the doctrine had its birth in admiralty antecedent to and independent of the common-law doctrine of fellow service. Its use in these cases only breeds confusion.[43]

Remedies

For a breach of any of these duties of the owner the ship is liable in rem, and the owner is liable in personam. But

[38] Gabrielson v. Waydell (C. C.) 67 Fed. 342; Lizzie Burrill (D. C.) 115 Fed. 1015; Memphis & Newport Packet Co. v. Hill, 122 Fed. 246, 58 C. C. A. 610.

[39] 19 Harvard Law Rev. 439.

[40] Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; Bunker Hill (D. C.) 198 Fed. 587.

[41] Atlantic, Fed. Cas. No. 620. (Latin "cura.")

[42] Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955; Governor (D. C.) 230 Fed. 857; Van Der Duyn (D. C.) 251 Fed. 746.

[43] 19 Harvard Law Rev. 441. See, also, an interesting and con-

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for an assault pure and simple the only remedy is in personam under Supreme Court admiralty rule 16.[44]

Effect of Recent Legislation on the Original Doctrine

Section 20 of the act of March 4, 1915, for the protection of merchant seamen (commonly known as the La Follette Act) provides:

"In any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow servants with those under their authority." [45]

Since the doctrine under discussion originates in the admiralty independent of any question of fellow service at common law, the materiality of this provision is not very evident. Yet there are some decisions gravely applying this doctrine, and holding that seamen of mere superior grade of service are not fellow servants. The natural meaning of "seamen having command" would be seamen having command of the ship, not merely those in charge of a number of seamen at work. A legislator familiar with the doctrine of fellow service would use some such term as "seamen of superior grade" in the latter case.

But all these cases arose from injuries due to defective appliances, which is a personal duty of the owner, not involving any question of grade of service or command.[46]

But in Chelentis v. Luckenbach S. S. Co.,[47] decided after the last-mentioned cases, the court reiterates the doctrine of the admiralty that a seaman injured by causes not due to the master's personal negligence is limited to wages,

vincing discussion of this phase of the subject by Mr. Frederic Cunningham, of the Boston bar, in 18 Harvard Law Rev. 294.

[44] 19 Harvard Law Rev. 443; Marion Chilcott (D. C.) 95 Fed. 688; Lizzie Burrill (D. C.) 115 Fed. 1015; Sallie Ion (D. C.) 153 Fed. 659.

[45] 38 Stat. 1185 (U. S. Comp. St. § 8337a).

[46] Colusa, 248 Fed. 21, 160 C. C. A. 161; Baron Napier, 249 Fed. 126, 161 C. C. A. 178; Corrado v. Pedersen (D. C.) 249 Fed. 165.

[47] 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171. See, also, Hoquiam, 253 Fed. 627, 165 C. C. A. 253.

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maintenance, and cure, and that section 20 of the La Follette Act does not affect the question, saying:

"Section 20 of the Seamen's Act declares 'seamen having command shall not be held to be fellow servants with those under their authority,' and full effect must be given this whenever the relationship between such parties becomes important. But the maritime law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship; it was of no consequence therefore to petitioner whether or not the alleged negligent order came from a fellow servant; the statute is irrelevant. The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employés on shore."

The enactment of workmen's compensation laws in many states has given rise to the question how far they govern or modify the general admiralty doctrine as to parties injured to whom an admiralty remedy is available. This is settled (as far as a decision by five judges against four can settle it) by Southern Pacific Co. v. Jensen.[48] Jensen was a longshoreman employed in unloading a ship, and while still on the ship was accidentally killed. The New York Compensation Commission awarded his widow compensation on the basis of the New York statute. On appeal to the Supreme Court it was held that the statute, in so far as it attempted to modify the general maritime law as accepted by the federal courts, or works material prejudice to its characteristic features, was invalid, and that the saving to suitors of a common-law remedy did not apply to a proceeding before such a commission, as it was unknown to the common law.

This decision was rendered May 21, 1917. Thereupon

[48] 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

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Congress amended section 24(3) and section 256 of the Judicial Code so as to make the first part read:

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give *it, and to claimants the rights and remedies under the workmen's compensation law of any state.*"

The italicized part is the addition.[49]

Since this amendment it has been held in Maryland that giving notice of claim under the Maryland statute was not a waiver of any right in admiralty. The case however was influenced if not entirely controlled by the fact that the claimant at the time of the notice was not in a condition to appreciate what he was doing.[50]

PERSONAL TORTS ARISING FROM RELATION OF PASSENGERS TO VESSEL

102. The relation between the passengers and the ship or her owners is governed by the general law of passenger carriers, except in so far as it is modified by statute.

The federal statutes contain many provisions looking to the safety of passengers and their accommodations. Chapter 6, tit. 48, of the Revised Statutes (sections 4252–4289), and chapter 2, tit. 52, of the Revised Statutes (sections 4463–4500), contain these provisions in detail.* They con-

[49] 40 Stat. 395 (U. S. Comp. St. 1918, §§ 991, 1233). Amendment held unconstitutional by Supreme Court May 17, 1920. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834.

[50] Siebert v. Patapsco Ship Ceiling & Stevedore Co. (D. C.) 253 Fed. 685.

* These sections, as they stood in the Revised Statutes, have been much modified by subsequent legislation, some having been repealed and many amended. But their provisions have been carried into the more recent acts in amplified form, and in the direction of more rigid requirements. They cannot be discussed for lack of space.

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tain, in general, regulations to insure a skillful crew, limitation of the number of passengers carried, many provisions against fire, requirements for boats, life preservers, and other appliances necessary in wrecks, and they prescribe heavy penalties for a violation of any of these provisions. But, outside of these statutes, any improper treatment of a passenger by any of the crew inflicted within the line of his duty is the subject of an action. For instance, in the Willamette Valley,[51] a passenger was allowed to recover damages for refusal to accept a first-class ticket and for giving him second-class accommodations.

In the Yankee,[52] a vigilance committee escorted an obnoxious citizen to a ship in the harbor, and recommended him to take a sea voyage, and the ship carried him away. He sued the owners of the ship in personam, and the court sustained the jurisdiction.

A passenger may proceed in rem for any actionable injury received aboard a ship, except assaults.[53]

OBLIGATIONS TO PERSONS RIGHTFULLY ON VESSEL, BUT BEARING NO RELATION TO IT

103. Persons rightfully on a vessel are entitled to demand the exercise of ordinary care towards them on the part of the vessel, under the doctrine of implied invitation.

In LEATHERS v. BLESSING,[54] a patron of a steamer, who was expecting some cargo by her, went aboard to make

They will be found in U. S. Comp. St. 1916, §§ 7997, 7999–8006, 8011–8014, 8225–8276.

§ 102. [51] (D. C.) 71 Fed. 712.

[52] Fed. Cas. No. 18,124, 1 McAll. 467.

[53] City of Panama, 101 U. S. 462, 25 L. Ed. 1061; Vueltabajo (D. C.) 163 Fed. 594. Also at common law. Austro-American S. S. Co. v. Thomas, 248 Fed. 231, 160 C. C. A. 309, L. R. A. 1918D, 873.

§ 103. [54] 105 U. S. 626, 26 L. Ed. 1192.

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inquiries about it, and was injured by a bale of cotton falling on him. He libeled in personam, and the court allowed a recovery.

The most frequent cases of this sort are those of laborers employed in and about a vessel in port. For instance, suppose that stevedores are employed as independent contractors to load or discharge a vessel, whether by the vessel herself or her charterers. In such case the vessel is not responsible for the acts of the stevedores' men causing damage.[55]

The vessel would be responsible for the act of a member of its crew if acting at the time in its service, though not if acting at the time in the stevedore's service.[56]

If the vessel is properly fitted up and constructed as usual, she is not responsible to any one who falls into one of her ordinary openings. These questions have frequently arisen in the case of men falling into open hatchways.

The duties and obligation of the vessel in reference to open hatchways have been the subject of much litigation. It has frequently been held that, so far as the crew of a vessel is concerned, and as regards workmen upon the vessel, like stevedores or their employés, it is not negligence to leave a hatchway open. Such men are supposed to be familiar with the construction of a ship, and to know that hatchways are necessary structures, and are made to be left open for the purpose of loading. If, therefore, the construction of the ship and its hatchways is proper, and there is no such defect about them as could be discoverable by the exercise of ordinary care, the fact that they are left open would not give a right of action against the ship, unless they were left open at a point where the laborers upon a ship would not naturally expect to find them open, and

[55] INDRANI, 41 C. C. A. 511, 101 Fed. 596; Ellerie (D. C.) 134 Fed. 146.

[56] Joseph John, 86 Fed. 471, 30 C. C. A. 199; Joseph B. Thomas, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58.

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had no rail or guard rope around them, or light to indicate their existence. As the cases well say, the doctrine of holes in highways or places where people are accustomed to resort has no application to such places, for the deck of a ship is not a highway, and men experienced in loading ships are assumed to take the risk of such ordinary openings as would be expected to exist upon a ship. If the hatchway was in every respect proper as far as the construction goes, and there was no negligence in uncovering it, and not properly guarding it, and this was done by the stevedore as an independent contractor, the ship would not be liable for his act.[57]

A hatchway left open by some one connected with the ship may, however, cause injuries to a passenger which would entitle him to sue where the crew or stevedores could not, because a passenger is not supposed to be as familiar with the construction of a ship as such men, and the measure of duty of a carrier towards a passenger is a much higher one. If there is an unguarded opening in parts of the ship where passengers are permitted to go, and an injury is received in consequence, the passenger could proceed against the ship.[58]

[57] Jersey City (D. C.) 46 Fed. 134; Horne v. George H. Hammond Co., 71 Fed. 314, 18 C. C. A. 54; Claus v. Steamship Co., 89 Fed. 646, 32 C. C. A. 282; Dwyer v. National S. S. Co. (C. C.) 4 Fed. 493; Saratoga (D. C.) 87 Fed. 349; Id., 94 Fed. 221, 36 C. C. A. 208; Auchenarden (D. C.) 100 Fed. 895; Roymann v. Brown, 105 Fed. 250, 44 C. C. A. 464; INDRANI, 101 Fed. 596, 41 C. C. A. 511; Consolidation Coastwise Co. v. Conley, 250 Fed. 679, 163 C. C. A. 25.

[58] Furnessia (D. C.) 35 Fed. 798. But, if he goes where he has no business to go, he cannot recover. Elder Dempster Shipping Co. v. Pouppirt, 125 Fed. 732, 60 C. C. A. 500.

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LIABILITY AS BETWEEN VESSEL AND INDEPENDENT CONTRACTOR

104. The vessel is not liable for injuries caused by independent contractors, but would be for injuries caused by its lack of ordinary care in furnishing proper tackle, if the contract of loading or discharging requires it to allow the use of its tackle.

Frequently, when charterers are loading a ship, the charter party provides that the steamer is to furnish use of tackle and engines. In such case, if the stevedore is an employé, and not an independent contractor, the ship is responsible for injuries caused by lack of reasonable care in selecting suitable appliances.[59]

But suppose that the ship makes such a contract with the charterer to allow the use of its tackle, and the stevedore is an independent contractor, selecting his own men. Suppose that in such case, while the stevedore is working with the ship's tackle, one of his men is injured by a defect in that tackle. The ship would not then be responsible if reasonable care had been used in the selection and upkeep of its appliances, and if they were reasonably sufficient for the work for which they were designed; but the responsibility, if any, would be upon the stevedore for subjecting it to an unusual strain or for other improper use.

But the ship would be responsible for an injury due to defects arising from lack of ordinary care in the above particulars.[60]

The English decisions are much narrower than the American. In Heaven v. Pender,[61] a dock company erected a

§ 104. [59] Elton, 83 Fed. 519, 31 C. C. A. 496.

[60] Beechdene (D. C.) 121 Fed. 593; Student, 243 Fed. 807, 156 C. C. A. 319; Frazier v. Luckenbach (D. C.) 248 Fed. 1011; McDonough v. International Navigation Co. (D. C.) 249 Fed. 248; Colon, 249 Fed. 460, 161 C. C. A. 418.

[61] 9 Q. B. D. 302. See, also, Earl v. Lubbock, [1905] 1 K. B. 253.

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staging around a ship under a contract with the shipowner. A man employed by the shipowner to paint the ship fell, in consequence of the giving way of this staging. He sued the dock company. Justices Field and Cave, of the Queen's Bench, held that there was no privity between him and the dock company, and that he could not recover. The case was taken to the Court of Appeals, where this decision was reversed, and he was allowed to recover.

But later in CALEDONIAN RY. CO. v. MULHOLLAND [62] this case was much limited, and placed on the ground that the party was impliedly invited to come on its premises by the dry dock company, and to use this staging, and that it was in its condition a trap, thus bringing the case under another well-known principle of the law of torts.

CALEDONIAN RY. CO. v. MULHOLLAND is interesting as bearing out this distinction. There a railway company contracted with a gas company to deliver coal at a certain point. Two coal cars were delivered at that point to another company, which received them for the gas company. While in charge of the second company, one of its servants was killed, owing to the fact that the brakes were out of order, and could not stop the cars. His administrator sued the first company on account of this defect in their cars, but the House of Lords held that the first company owed him no duty, and that he could not recover.

DOCTRINE OF IMPUTED NEGLIGENCE

105. Negligence on the part of a vessel is not now imputable to a person injured while on board the vessel, but who is not connected with its management or navigation.

The doctrine of imputed negligence, by which a person on one ship or vehicle, though not identified with its man-

[62] [1898] A. C. 216.

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agement or navigation, is chargeable with the negligence of his own vehicle, and cannot, in case of such negligence, proceed against the other vessel if also negligent, has been repudiated by the modern authorities. As the law now stands, a person injured on a vessel in collision can proceed against either or both as either or both are negligent.[63]

MISCELLANEOUS MARINE TORTS

106. Admiralty has jurisdiction of any tort on navigable waters which creates a cause of action.

A common instance of this is assault. Under admiralty rule 16 there is no remedy in rem against the ship for such assaults, but there would be against the owner if the assault was made by any of the crew within the course of his employment, and there certainly would be against the man who makes the assault.[64]

§ 105. [63] New York, P. & N. R. Co. v. Cooper, 85 Va. 939, 9 S. E. 321; LITTLE v. HACKETT, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; Bernina, 13 A. C. 1; Contino v. Wilmington Steamboat Co. (D. C.) 226 Fed. 991.

§ 106. [64] Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575; Plummer v. Webb, 1 Ware, 69, Fed. Cas. No. 11,234; Steele v. Thacher, 1 Ware, 85, Fed. Cas. No. 13,348; Turbett v. Dunlevy, Fed. Cas. No. 14,241; Miami (D. C.) 78 Fed. 818; Id., 93 Fed. 218, 35 C. C. A. 281. Whether the master, in assaulting a person aboard ship, is acting in the course of his employment—or, in other words, whether the vessel or her owner is responsible for a willful or intentional assault—depends on the ordinary principles of the law of torts. As is well known, it was for a long time the doctrine of the courts that such an act was not within the course of the servant's employment, and that the master was not liable therefor, except in cases of carriers and innkeepers. Recent decisions have much modified this doctrine, but it is hardly within the purview of this treatise to discuss it elaborately. In the last-cited case the court held that such an assault of the master upon a stowaway aboard a ship was not within his employment, and did not render the vessel or owner liable. See, on the general subject, the recent

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But, though a physical wrong done by the master of the ship is an assault, in the sense of admiralty rule 16, for which the injured party cannot proceed in rem, this principle does not apply to his dog. Accordingly, where a pilot who was rightfully on board was bitten by a dog in the cabin where he had been assigned, the court allowed him to proceed in rem against the vessel.[65]

The right of a parent to sue for an abduction of his son is an instance of such a marine tort.[66]

So the right of a husband to sue for injuries sustained by his wife on navigable waters.[67]

So a suit for the illegal seizure of a vessel.[68]

Until quite recently locality has been assumed by the American decisions as the sole criterion in passing upon the question whether a tort is maritime or not. But in Campbell v. H. Hackfeld & Co.[69] the Circuit Court of Appeals for the Ninth Circuit attempted to add another qualification.

It was a suit for personal injuries by an employé of a stevedoring company against his employer for negligence during the unloading of a vessel in the port of Honolulu. No negligence of the ship or any of its crew was involved. It was decided that in order to constitute a maritime tort, it must not only occur on navigable waters, but must also

English cases of Hanson v. Waller, [1901] 1 Q. B. 390, and Sanderson v. Collins, [1904] 1 K. B. 628.

[65] Lord Derby (C. C.) 17 Fed. 265. In 2 Seld. Select Pleas in Adm. (Introduction, lxxxii), in 1642, "the master of the Success sues the master of the Sunflower for injuries to Richard Child, one of his crew, by a 'certaine wilde beaste called a munkey, ape, or baboone' which he kept for his pleasure, 'or some other respect' but unchained, so that it escaped, and 'without any provocation or cause given him by the said Richard Child' seized upon and bit him severely."

[66] Tillmore v. Moore (D. C.) 4 Fed. 231.

[67] New York & Long Branch Steamboat Co. v. Johnson, 195 Fed. 740, 115 C. C. A. 540, 42 L. R. A. (N. S.) 640.

[68] Ex parte Fassett, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087; Carolina (D. C.) 66 Fed. 1013.

[69] 125 Fed. 696, 62 C. C. A. 274.

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have some relation to a vessel or its owners, and that the sole fact that it occurred on the vessel did not make it maritime where the parties involved in the controversy were not parties for whom the vessel was not responsible.

This was followed in the St. David [70] without discussion of the principle involved.

But in Imbrovek v. Hamburg-American Steam Packet Co.[71] Judge Rose, sitting in the District Court of Maryland, in a case precisely similar, sustained the jurisdiction of the court as based on locality, regardless of relationship to the vessel, and also because stevedoring was essentially maritime in character. His decision was affirmed, both by the Circuit Court of Appeals and the Supreme Court, though the latter court, while holding that stevedoring was essentially maritime, did not absolutely commit itself to the proposition that locality alone, whether connected with a ship or not, is sufficient to make a tort maritime.

The American authorities are reviewed in the different opinions in this case. But the main authority on which the judges relied in Campbell v. H. Hackfeld & Co. was the English case of Queen v. Judge.[72]

It was an application to a common-law court for a mandamus to compel an admiralty court to take jurisdiction of a suit against a compulsory pilot for damages due to his negligence in a collision. (In England neither vessel nor owner was then liable for the negligence of a compulsory pilot.) The court denied the writ, partly on the ground that no precedent could be found for such a suit, and partly on the ground that there were several precedents against it, saying that it made no difference whether it was a case of

[70] (D. C.) 209 Fed. 985.

[71] (D. C.) 190 Fed. 229; Atlantic Transport Co. v. Imbrovek, 193 Fed. 1019, 113 C. C. A. 398 (affirmed without opinion); 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157 (under name of Atlantic Transport Co. of West Virginia v. Imbrovek).

[72] [1892] 1 Q. B. 273.

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compulsory or voluntary pilotage. One opinion ends: "I for one will not reopen the floodgates of admiralty jurisdiction upon the people of this country."

It has been pointed out more than once that the American jurisdiction in admiralty is not shackled by the chains riveted upon the English jurisdiction in consequence of the warfare of the common-law courts. The opinion recognizes this fact and dismisses the American decisions summarily from consideration, mentioning the fact that contracts of marine insurance are not cognizable by the English admiralty, though a recognized subject of jurisdiction in America. English cases on questions of jurisdiction must therefore be used in America with great caution.

In fact, much of the reasoning in this case has been explained away in later cases.[73]

In considering the special question whether a suit would lie in admiralty against a pilot, several decisions to the contrary are cited. An examination of them will show that they turned largely in the first place on the fact that the liability of an English pilot is limited by statute and is covered by a bond; and the English courts denied the admiralty jurisdiction over a sealed instrument. These decisions also hold that jurisdiction of suits against a pilot is not conferred by the statutes extending the jurisdiction of the admiralty; for they speak of "damage done by any ship," which does not cover negligent acts of a pilot.

After discussing these decisions, the opinion goes on to assert that, "from beginning to end, not a single case is to be found in the books which shows that the admiralty court ever entertained such a case as this against a pilot."

But in the later case of the Germanic,[74] which was a libel in rem for a collision between two ships, an application was made to bring in a compulsory pilot as codefendant. The

[73] Theta, [1893] A. C. 468.
[74] [1896] P. 84.

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court, not doubting its jurisdiction, refused the application solely on grounds of inconvenience.

The main case under discussion was published in 1892. In 1894 and 1897 the Selden Society published its "Select Pleas in Admiralty," constituting volumes VI and XI of its publications. They were edited by Mr. R. G. Marsden, and each volume contains an introduction which casts a flood of new light upon the early history of the English admiralty, which long had criminal as well as civil jurisdiction. They show many precedents of suits against pilots.[75]

The opinion in the main case questions the jurisdiction of the admiralty over a suit against the master personally for a collision.

But there are certainly precedents in England for suits against a master. In the Ruckers [76] Lord Stowell sustained a libel against a master by a passenger for an assault. He had the old records searched, and sustained jurisdiction "in causes of damage between persons who were not connected by any relation arising from official situations on board the ship." This decision is cited with approval in the Zeta.[77] If such a question is an open one in England, it certainly is not in America, as Supreme Court admiralty rules 15 and 16 recognize the right.

In the main case under discussion Kay, J. (at page 310), states as an argument against the jurisdiction that the locality test, if applied literally, would include a slander on the high seas, and the same illustration was used in Atlantic Transport Co. v. Imbrovek, heretofore cited. The Selden Society publication shows precedents for just such suits.[78]

[75] 1 Select Pl. Adm. (Introduction) lxvii, lxx [14]; Id. 102, 213. 64; 197. 2 Id. (Introduction) xxviii, xxix. See, also, the essay by Mears on the admiralty jurisdiction first published as the introductory chapter to Roscoe's Admiralty Jurisdiction, 1903, and republished in 2 Anglo-American History, 312, especially 327.

[76] 4 C. Rob. 73.

[77] [1893] A. C. at p. 483.

[78] 1 Select Pl. Adm. (Introduction) lxix, lxxxiii, 100, 212. The

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And there are many precedents of suits for assaults.[79]

In fact it is obvious that originally the admiralty had jurisdiction, not over torts alone, but over contracts made out of the realm (including the space between high and low water mark when the tide is in), for the reason, as expressed by Littleton, "Que chose fait hors del Royalme n'aient poet estre trié diens le Royalme per le secrement de 12"—that things done out of the realm may not be tried within the realm by the oath of twelve men; in other words, by a jury of the vicinage.[80]

And so the reductio ad absurdum of the common-law warfare on the admiralty was the conclusion that in case of a murder committed between high and low water mark neither had jurisdiction if the party died on shore.[81]

And there is abundant authority for the proposition that admiralty has jurisdiction over torts committed on navigable waters, regardless of the presence or absence of a ship in the matter.[82]

last reference, it is true, was a suit against the master, but if he is sued individually and not for any act connected with the management of his ship, what is the difference?

[79] 1 Select Pl. Adm. (Introduction) lxix, lxxxiii, 111, 217; 2 Id. [Introduction] xxviii–xxix, lxxii (153).

[80] Godolphin, View of the Admiral Jurisdiction (Ed. 1685) pp. 92, 94, 103.

[81] Lacy's Case, 2 Co. Rep. 93; 76 Eng. Rep. 616: also 1 Leon. 270; 74 Eng. Rep. 246. See, also, case of the admiralty, 13 Co. Rep. 51; 77 Eng. Rep. 1461. Sir Henry Constable's Case, 5 Co. Rep. 107; 77 Eng. Rep. 218.

[82] See the charge of Sir Leoline Jenkins to his grand jury, 2 Browne Civil & Admiralty Law 463 et seq., especially 474, 483, and xxxxx 484. See, also, many instances in 2 Select Pl. Adm. such as obstructing the admiralty coroner (lxxii, No. 75), trespass on the foreshore "taking gould stones and sulphur stones" (lxxiv, No. 30), concealing valuables taken from a corpse ashore at Cuckmere Haven (lxxv, No. 47), damage to river wall at Blackwall whereby plaintiff's land was flooded (lxvi, No. 99), trespass to a muscle bed (lxvii, No. 60), and taking a sturgeon (lxxii, No. 118). See, also, 1 Laws Admiralty (Millar, London, 1746) for many instances (pp. 113–116),

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DOCTRINE OF CONTRIBUTORY NEGLIGENCE

107. In awarding damages for personal injuries in admiralty, the common-law doctrine that contributory negligence bars recovery does not apply.

It will be seen, in connection with the law of collision, that, where both vessels are in fault, the damages are equally divided, regardless of the degree of fault of each vessel. In assessing damages for injuries to the person, the courts do not feel bound, as in collision cases, to divide them equally, but, where the party hurt is more negligent than the vessel, they may award him damages. The matter is largely in the discretion of the court.[88]

such as converting salt water to private use, obstructions to navigation, injuries to banks, docks, or wharves, "prejudices done to or by passengers on shipboard," and showing false lights, whether afloat or ashore.

§ 107. [88] Daylesford (D. C.) 30 Fed. 683; MAX MORRIS, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586; Carter v. Brown, 212 Fed. 393, 129 C. C. A. 69.

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CHAPTER X

OF THE RIGHT OF ACTION IN ADMIRALTY FOR INJURIES RESULTING FATALLY

108. Survival of Action for Injuries Resulting in Death—The General Common-Law Doctrine.
109. The Civil-Law Doctrine.
110. The Continental Doctrine.
111. The English Doctrine as to Survival in Admiralty.
112. The American Doctrine as to Survival in Admiralty—Independent of Statute.
113. Under State Statutes.
114. Under Congressional Statutes.
115. The Law Governing.
116. Effect of Contributory Negligence.
117. Construction of Particular Statutes.

SURVIVAL OF ACTION FOR INJURIES RESULTING IN DEATH—COMMON-LAW DOCTRINE

108. By the common law there was no right of action for injuries resulting in death.

109. CIVIL-LAW DOCTRINE—Neither was there any such right by the civil law in case of the death of a freeman.

110. CONTINENTAL DOCTRINE—The Continental nations, however, recognize such a right, both on land and water, and have recognized it for probably two centuries.

The Common-Law Doctrine

At common law there was no survival of a right of action for injuries inflicted by another causing death; the reasons assigned being that such an action was personal to the party

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injured, and that the civil injury was merged in the greater injury to the state.[1]

As to the action being personal to the party injured, it is easily seen why such actions should not survive. In such cases the party may not elect to proceed, and so the avoidance of litigation is accomplished. But, even as to the injured party, this power of election does not exist when death ensues. And the reason ignores the fact that the party killed is not the only one injured. There are many cases where suit is brought, not for a right of action derived from the party injured, but for damages caused directly to the suitor. As a result, the common law finds itself in the absurd position of giving a right of action to the parent for the loss of the services of his son if some one beats him so severely as to disable him, but not if the beating is carried so far as to kill him. A parent may sue at common law for loss of the services of his daughter if some libertine seduces her, but not if some brute outrages and murders her. It seems to be one case where the part is greater than the whole.

When aged and indigent parents are deprived by death of the son who is supporting them, or a wife with a family of helpless children is left to feed and rear them unaided by the strong arm which has theretofore done all the labor, it is a mockery to say that only the dead was the party affected. The empty larder teaches the contrary, and the case is not analagous to those wrongs like slander or libel, which are, in nature, strictly personal.

On natural principles of equity, such wrongs should have a remedy.

The Civil-Law Doctrine

The doctrine of the civil law on the subject is not entirely clear. In Hubgh v. New Orleans & C. R. Co.,[2] the Supreme

§§ 108–110. [1] Baker v. Bolton, 1 Camp. 493.
[2] 6 La. Ann. 496.

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Court of Louisiana decided that by the civil law there was no right of action for damages resulting in the death of a freeman, as the value of a freeman's body could not be estimated in damages; but that there was such a right of action in case of a slave. In the course of the opinion it is also said that the well-known passage of Grotius[3] was intended to enunciate merely a duty of imperfect obligation arising from natural law, and not any requirement of municipal law. On the other hand, Judge Deady, in Holmes v. Oregon & C. R. Co.,[4] states that the Roman law did give such a remedy, though he cites no authority for the statement. It is probable, however, and certainly the opinion of the leading commentators, that the provisions in the ancient civil law in relation to the killing of freemen were penal, rather than civil.

The Continental Doctrine

However this may be, the leading Continental nations, which have drawn from the civil law their principles of right and remedy, have adopted in their system of laws, a remedy for such cases.

The above-cited decision from Louisiana states that the law of France allows such a remedy, though it did not feel bound to adopt the French law on the subject for Louisiana.

In Holland (long the maritime rival of England) the right of action is firmly established, and has been for centuries. It is an equitable development of the penal provisions of the civil law relating to the death of freemen.

Grotius, in his Introduction to the Jurisprudence of Holland,[5] says:

[3] "Homicida injustus tenetur solvere impensas, si quæ factæ sunt in medicos, et iis quos occisus alere ex officio solebat, puta parentibus, uxoribus, liberis dare tantum quantum illa spes alimentorum, ratione habita ætatis occisi, valebat." 2 Grot. de J. B. c. 17.

[4] (D. C.) 5 Fed. 75.

[5] Book 3, c. 33 (Herbert Ed. London, 1845).

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"Sec. 2. But the slayer is properly bound to make compensation to the widow, children, and others, if any there be, who were usually supported by the labor of the deceased, for losses and loss of profits calculated upon the principal of annuity."

"Sec. 5. And it is to be observed that in the punishment, as well as the reconciliation, a great distinction is made between cases where homicide has been effected by assassination—that is, secretly and treacherously, or where the criminal was aware of what he was doing—and cases where the party was slain unawares; or where the homicide took place in a personal conflict with unlawful or forbidden, or with equal or unequal, weapons, and which has given occasion to the combat; or where, in short, the homicide did not occur from passion, but from neglect. But, as far as regards compensation, these circumstances are not taken into consideration, as it is sufficient for that purpose that it has been occasioned by the fault of some one, in which is included the neglect or unskillfulness of a physician or midwife, and the neglect or ignorance of a waggoner or skipper, or the incapacity of either in managing a ship or horses."

Vinnius, in his Commentaries on the Institutes (3d Ed., Amsterdam, 1659), in discussing the title of the Aquilian law, says that there was no right of action under that law for the death of a freeman; but that there was under the Cornelian law if the killing was intentional (dolo), but, if negligent (culpa), a fine was imposed; but that, if there is a question of civil remedy, the unjust slayer is required to pay the funeral and medical expenses, and such a sum to those whom the deceased was bound to support—as, for instance, children, wife, and parents—as their expectation of support was worth, considering his age.

J. Voet, in his Commentary on the Pandects, after referring to various texts of the Roman law on the subject of rights of action for personal injuries, states that in modern times this right has been extended to the case of injuries

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resulting in death, and gives a right of action to the children or other relations, in which each should sue for the loss personally caused to him, not for any loss inherited from the deceased.[6]

In Germany, also, the right exists. In a decision of the German Reichsgericht, rendered in 1882,[7] it was held that this right of action existed in favor of parents for the negligent killing of a son. The opinion cites many commentators, and traces the doctrine back for two centuries.

The law of Scotland also allows actions to the wife or family of the deceased as a development of the unwritten law of that country.[8]

As these countries administer the law substantially the same in all their courts, and do not have common-law courts with one system and other courts with another system, the doctrine with them applies on land and sea alike.

This prevalence of the doctrine among the leading Continental nations would seem to settle that it is at least sufficiently recognized to entitle it, in so far as it may be maritime in nature, to be considered a part of the general body of maritime law as administered by maritime nations. In other words, any other nation that may choose to adopt it into its jurisprudence is not making something maritime

[6] "Nec dubium, quin ex usu hodierno, latius illa agendi potestas extensa sit; in quantum ob hominem liberum culpa occisum uxori et liberis actio datur in id, quod religioni judicantis æquum videbitur, habita ratione victus, quem occisus uxori liberisque suis aut aliis propinquis ex operis potuisset ac solitus esset subministrare. * * * Qua in re si concurrat forte uxor, parentes, liberi, alter alteri præferendus non est; sed magis unicuique in id, quanti sua interesse docet, actio danda; tum quia singuli non de pœna, sed damno sibi illato reparando contendunt; tum quia hæc actio uxori, liberis, similibusque, non qua occisi heredibus adeoque jure hereditario, sed qua læsis ex facto occidentis datur; sic ut et illis accommodanda veniat, qui defuncto heredes esse ab intestato non potuerunt, vel. occisi hereditatem, utpote suspectam noluerent adire." Volume 1 (Ed. 1723) p. 542.

[7] Entscheidungen des R. G. in Civilsachen, vol. 7, p. 139.

[8] Bell, Comm. § 2029; Clarke v. Coal Co., [1891] A. C. 412.

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that was not maritime before, is not extending the limits of the general maritime law, but is merely drawing from that fountain something that was there already.

THE ENGLISH DOCTRINE AS TO SURVIVAL IN ADMIRALTY

111. In England there is no right of action in rem in admiralty for injuries resulting in death.

The English courts recognized no such right in the admiralty equally as at law. Lord Campbell's Act[9] did away with this doctrine of the common law, and gave a right of action to the personal representative for the benefit of the wife, husband, parent, or child for the injury done to them, not for any injury to the deceased inherited by them. The act expressly excepted Scotland, for the reason, above explained, that the right already existed there.

It was long a question in England whether this statute was intended to apply to the admiralty courts. After much fluctuation, it was finally settled by the House of Lords in the VERA CRUZ,[10] decided in 1884, that the language of the English act contemplated only suits in the common-law courts, as was evident from the provisions in relation to juries, and that neither that act, nor the other acts giving the admiralty courts jurisdiction in case of "claims for damage done by a ship," gave the latter courts cognizance in rem over death claims. This is still the law of England.

§ 111. [9] 9 & 10 Vict. c. 93.

[10] 10 App. Cas. 59. In the Bernina, L. R. 12 P. D. 58, 13 A. C. 1, an action in personam in the Probate, Divorce, and Admiralty Division was sustained, but it was on the ground that such court was a division of the High Court of Justice under the English Judicature Act, and not by virtue of the jurisdiction possessed by it as an admiralty court. See, also, Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751.

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THE AMERICAN DOCTRINE AS TO SURVIVAL IN ADMIRALTY—INDEPENDENT OF STATUTE

112. In America there is, independent of statute, no right of action in the admiralty for death injuries.

In the United States the decisions have been far from harmonious. In our dual system of laws, we must consider the question independent of state statute, and also as affected by such statutes.

Some of the District Judges, when the question came before them, decided that the common-law doctrine did not govern the admiralty courts; that it was not consonant with natural justice; and that the widow and children had a natural right to damages. Hence they sustained suits by the widow and children, not by the administrator, even in states that had enacted Lord Campbell's Act.[11]

The question first came before the Supreme Court in Ex parte Gordon,[12] decided in 1881. A libel had been filed in a District Court against a vessel for a death caused by a marine collision. A writ of prohibition was asked to restrain the court from entertaining the case as one beyond its cognizance. The Supreme Court decided that, as collision was a marine tort, the District Court had jurisdiction over the subject-matter; that whether to consider this special claim was a question of the exercise, not of the existence, of jurisdiction; that the lower court could pass upon such a question; and that the proper way to raise it was by appeal. This, therefore, settled nothing.

One branch of the question was presented squarely in the HARRISBURG,[13] decided in 1886. That was a collision

§ 112. [11] Sea Gull, Chase, 145, Fed. Cas. No. 12,578; Highland Light, Chase, 150, Fed. Cas. No. 6,477.

[12] 104 U. S. 515, 26 L. Ed. 814.

[13] 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358.

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between the schooner Tilton and the steamer Harrisburg, a Pennsylvania steamer, in Massachusetts waters, in which the mate of the Tilton, a citizen of Delaware, was killed. His widow and child libeled the steamer in the United States District Court at Philadelphia. Both Massachusetts and Pennsylvania had statutes giving suits to the administrator, but these were held inapplicable, as the libel had not been brought within the time required by those statutes.

Chief Justice Waite reviewed the American decisions, and held that the rule of the common law against the right was well established, and that there was nothing to show that the rule of the admiralty law was different; and he held that, independent of statute, the right of action did not exist, reserving the question whether a statute could give it.

This and the subsequent case of the Alaska [14] settle that the right of action does not exist independent of statute.

Then came the CORSAIR,[15] decided in 1892. It was a libel in rem against a Louisiana steamer by the parents of a passenger killed by the negligence of the steamer in Louisiana waters. The claim was based upon the sections of the Louisiana Code providing for the bringing of actions for injuries resulting in death. The court held that the statute was evidently not intended to give a remedy in rem, and that, therefore, the court had no jurisdiction of the case. The opinion, however, seems to consider that an action in personam could have been sustained, though this was not necessary to the decision.

In the Hamilton [16] the Supreme Court entertained jurisdiction of claims for loss of life filed in a limited liability proceeding, and intimated again that a proceeding in personam could be resorted to, though it was not necessary to the decision. As a limited liability proceeding stops any other, whether in a state or federal court, and compels all cred-

[14] 130 U. S. 201, 9 Sup. Ct. 461, 32 L. Ed. 923.
[15] 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.
[16] 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264.

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itors, whether lien creditors or not, to come in, this settles nothing as to the power to establish such a right of action in admiralty by statute.

Hence the question must next be considered, first, in reference to state power of legislation; and, second, in reference to congressional power of legislation.

SAME—UNDER STATE STATUTES

113. A state statute may give a remedy for death injuries, enforceable by proceedings in rem or in personam in the admiralty courts, or by ordinary suit in the common-law courts.

The mere fact that a state statute may affect a ship or subjects over which admiralty has jurisdiction does not invalidate it. There are many cases where there are concurrent remedies in the state and admiralty courts. Hence there can be no question of the right of a state to give the remedy by common-law action, even for a cause of action maritime by nature. In American S. B. Co. v. Chase,[17] decided in 1872, which was a suit at common law for a death in the waters of Rhode Island caused by a marine collision, the Rhode Island statute giving the right of action at common law was held valid, notwithstanding the point made by defense that the cause of action was maritime by nature, and that the statute was an infringement of the exclusive admiralty jurisdiction of the federal courts. The court forbore to decide whether it was maritime or not, but held that the state could authorize a common-law action in either case.

In Sherlock v. Alling,[18] decided in 1876, an Indiana statute to the same effect was attacked on another ground. It was claimed to violate the commerce clause of the federal

§ 113. [17] 16 Wall. 522, 21 L. Ed. 369.
[18] 93 U. S. 99, 23 L. Ed. 819.

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Constitution, as imposing a new burden on commerce. But the court held that it affected commerce only indirectly, and that in such matters the states could legislate as long as Congress failed to legislate on the subject.

Hence, as far as this special subject is concerned, the power of a state to legislate, in the absence of legislation by Congress, is clear, subject to certain restrictions.

This is, subject to the qualification, explained in a former connection,[19] that a state cannot give to its courts an action in rem pure and simple to enforce a maritime cause of action.

The power of a state to legislate in matters of admiralty cognizance has been frequently considered. In Ex parte McNiel,[20] the court says that, though a state statute cannot confer jurisdiction on a federal court, it may give a substantial right, which is enforceable in the proper federal court, whether equity, admiralty, or common law, according to the character of the right given. In other connections the court has decided that, if the subject-matter is maritime a state statute may annex a right in rem, enforceable in the admiralty court. It may give its courts jurisdiction even of admiralty matters, provided it does not give them an admiralty procedure in rem. Hence a state statute giving a right of action in rem for supplies and repairs on domestic vessels is valid as long as it leaves the power of enforcing the same by pure proceedings in rem to the federal courts.[21]

But a state statute giving a right of action in rem for building a ship does not confer such a power of enforcement on the federal courts, as such a transaction is not maritime by nature, and the states cannot change the nature of an action from nonmaritime to maritime.[22]

[19] Ante, pp. 29, 110.
[20] 13 Wall. 236, 20 L. Ed. 624.
[21] Glide, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296.
[22] Roach v. Chapman, 22 How. 129, 16 L. Ed. 294.

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For the very reason that it is not maritime they can give a remedy in rem to their own courts to enforce a shipbuilding contract, as the power of the states over matters not maritime is not restricted by the constitutional provisions giving the federal courts exclusive cognizance of cases of admiralty and maritime jurisdiction.[23]

A further limit on the state power of legislation over admiralty subjects has been added by recent decisions of the Supreme Court. Heretofore it has been the usual, if not universal, understanding as to the Supreme Court decisions that, if a state statute creates a right of action in connection with subjects maritime by nature, an admiralty court would recognize it and enforce it by its own peculiar procedure, and that, if the subject is maritime by nature, the limit as to state legislation was simply on its power to interfere with the exclusive jurisdiction of an admiralty court in rem.

But in Southern Pacific Co. v. Jensen[24] the court went far beyond this. It held that a state law could not "work material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony and uniformity of that law in its international and interstate relations," and it held that a common-law court in the trial of a case was required to apply the doctrines of admiralty law, if the case was of a maritime nature, regardless of a state statute purporting to affect it.

It repeated the ruling in two later cases.[25] As there was in ordinary cases no established admiralty rule as to injuries resulting in death, this additional qualification would not affect the state power of legislation over such cases, as

[23] Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; North Pacific S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U. S. 119, 39 Sup. Ct. 221, 63 L. Ed. 510.

[24] 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

[25] Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171; Union Fish Co. v. Erickson, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261.

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its effect would be rather to supplement than to "work material prejudice."

But there is one class of cases in which its effect would be far-reaching; that is, in case of the representatives of a seaman suing for a death caused by negligence of the shipowner, the basis of the suit being a state statute giving such a right of action.

Under the old admiralty authorities, the only responsibility of a shipowner to a seaman, in the absence of personal negligence, is for maintenance and cure, and does not extend beyond the seaman's life. Hence it ought to follow as a corollary from these decisions that a state can not create a right of action for negligent injuries resulting in the death of a seaman. Prior to those decisions such suits were common.[26]

But, with these qualifications, if the subject-matter discussed in this chapter is by nature maritime, the power of a state to give an action enforceable in an admiralty court, in the absence of congressional legislation, seems to follow.

Restrictions of State Statute Binding

As the right to sue depends on the state statute, it follows that the state, in giving the right, may name the conditions on which it is given. Hence the restriction of the right to sue to one year, contained in Lord Campbell's Act and embodied in nearly all the state statutes based upon it, is binding on suits in the admiralty court. This is not a statute of limitations, but a condition on which the right is given, and performance must be shown by the plaintiff as part of his case.[27]

[26] Transfer No. 12, 221 Fed. 409, 137 C. C. A. 207.

[27] Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; Stern v. La Compagnie Générale Transatlantique (D. C.) 110 Fed. 996; International Nav. Co. v. Lindstrom, 123 Fed. 475, 60 C. C. A. 649. Unless the California statute differs from the usual form of these statutes, Western Fuel Co. v. Garcia, 255 Fed. 817, 167 C. C. A. 145,

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In this connection it is material to consider how far the workmen's compensation laws enacted in many states affect the right to sue in the admiralty for damages resulting in death.

This is largely a question of construing the state legislation on the subject. The usual type of compensation law restricts those who come under its terms to the remedies provided by the law itself. The right of action for damages resulting in the death of an employé is to that extent abolished.

Logically it should follow that, where the right of action depends on a state statute, it would fall in the admiralty court wherever it would fall in the state court. The power which makes can unmake, in whole or in part. It can repeal such a right entirely, or modify it as seems best.

So far this question has not been directly presented, and it remains to be seen whether the judges will follow their heads or their hearts.[28]

Fatal Injury on Water—Death Ashore

In discussing the bounds of admiralty jurisdiction in tort, it has been seen that where the cause of action is consummate on the water, admiralty has jurisdiction, though addi-

deciding the contrary, cannot be sustained. It is true, as the court says, that the recognized principles of the maritime law are unaffected by local legislation, at least since the recent decisions of the Supreme Court. But the right to sue for damages resulting in death is not "a recognized principle of the maritime law," but a new right depending so far on state statutes and subject to the conditions of those statutes. Besides, there are many instances where the "recognized principles of maritime law" have been affected by local legislation, such as pilotage, materialmen's liens, local regulations of navigation, and a number of others.

[28] Bjolstad v. Pacific Coast S. S. Co. (D. C.) 244 Fed. 634, is somewhat analogous. There the Workman's Compensation Act of New Jersey was held to modify the New Jersey death statute as to one class of employés. Judge Dooling aptly said: "If one has to rely on a state law to support a claimed right, he must take the law as he finds it, hardships and all." But on May 27, 1920, the Supreme

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tional injuries immediately following on land may aggravate the damages, and that on the other hand, where the cause of action is consummate only on land, admiralty has no jurisdiction, although the injury originated on water.[39]

The application of this doctrine to the case of a person injured fatally on a ship, but not dying till after he has been carried ashore, depends—or ought to depend—on the character of the state statute giving the right.

It is well known that state statutes giving this right of action fall under two classes. One class recognizes the right of the deceased to sue for the injury inflicted, and provides that such right of action, vesting independent of statute in the deceased, shall survive, thus simply abolishing the common-law rule that a personal right of action dies with the person. The Massachusetts and Louisiana statutes may be taken as types of this class, and these are called "survival acts."

Another type gives an entirely new right of action to the parties injured by the death, such as dependents, for the loss to them by reason of the death, independent of any right of action to the deceased. Lord Campbell's Act in England, which was the prototype of these statutes, and the Virginia statute, are good illustrations of this type. These are usually designated as "death acts."

It is obvious that under a survival act the right of action is consummate when the fatal injury is inflicted, and that the subsequent suffering and death are only cumulative.

It is equally obvious that under a death act the right of action is not consummate till death occurs.[40]

Court decided such acts invalid as affecting admiralty. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834.

[39] Ante, p. 199.

[40] In Carolina, C. & O. R. R. v. Shewalter, 128 Tenn. 363, 161 S. W. 1136, Ann. Cas. 1915C, 605, L. R. A. 1916C, 964 (affirmed without opinion Shewalter v. Carolina, C. & O. Ry., 239 U. S. 630, 36 Sup. Ct. 166, 60 L. Ed. 476), is an admirable discussion of these two classes. See, also, Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 193, 57 L. Ed. 417, Ann. Cas. 1914C, 176.

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Hence, in a case arising under a survival act, admiralty ought to have jurisdiction, though the death occurred on land.

And in a case arising under a death act, admiralty ought not to have jurisdiction, where the death occurred on land.

Accordingly, in Ryley v. Philadelphia & R. R. Co.,[81] Judge Adams held that admiralty had no jurisdiction in a case turning on the Pennsylvania statute (a death statute) where the injured party died on shore.

And in Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft v. Gye,[82] the Circuit Court of Appeals for the Fifth Circuit held, in a case arising under the Louisiana statute (a survival statute), that there was jurisdiction.

This case was followed in the Anglo-Patagonian [83] by the Circuit Court of Appeals for the Fourth Circuit, in a case arising under the Virginia statute (a death statute), overlooking the radical difference between the Louisiana and Virginia statutes.

SAME—UNDER CONGRESSIONAL STATUTES

114. Congress, under its general power to regulate maritime subjects, can give a right of action in admiralty for death injuries; and a congressional statute would supersede any state statutes in so far as they conflict with it.

It is now necessary to consider how far Congress may legislate on the subject.

[81] (D. C.) 173 Fed. 839.

[82] 207 Fed. 247, 124 C. C. A. 517. That the Louisiana act is a survival act, see Carolina C. & O. R. R. v. Shewalter, 128 Tenn. 363, 161 S. W. 1136, Ann. Cas. 1915C, 605, L. R. A. 1916C, 964, affirmed Shewalter v. Carolina, C. & O. Ry., 239 U. S. 630, 36 Sup. Ct. 166, 60 L. Ed. 476, ante, note 30, and the Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.

[83] 235 Fed. 92, 148 C. C. A. 586.

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The federal courts as a class derive their admiralty jurisdiction direct from the Constitution, and not from congressional statutes. How far may federal statutes affect the admiralty jurisdiction? There are many statutes which do affect it—like the statutes regulating the rules of the road at sea, requiring inspection of steamers, regulating the rights of merchant seamen, etc. It was at one time supposed that similar legislation rested upon the power to regulate commerce, which reasoning, if sound, would have defeated the power of regulating vessels engaged solely in internal commerce. And so it was held as far back as the GENESEE CHIEF,[84] decided in 1851, that Congress derives some powers of legislation from the admiralty clause of the Constitution, and is not limited to the commerce clause. This has been reiterated in many later cases, notably in EX PARTE GARNETT,[85] decided in 1891.

This power of Congress to regulate admiralty jurisdiction must now be defined more accurately. As the grant is by the Constitution itself, Congress cannot change the general limits or bounds of the admiralty. But within those bounds, as understood by the common consent of enlightened maritime nations, it may regulate procedure, and even rights. It may adopt into our law doctrines of marine law found in other maritime codes, though our admiralty courts had never before administered such a doctrine. It cannot make that marine which is not marine by nature, but, if it is marine by nature, and so recognized in maritime circles, Congress may give it a place in our admiralty law which it had never had before. To illustrate, Congress could pass a statute regulating the manner in which approaching vessels should act to prevent collision, though both were enrolled in Virginia, and never left the boundaries of Virginia; but Congress could hardly pass a statute regulating the pre-

§ 114. [84] 12 How. 443, 13 L. Ed. 1058.
[85] 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631.

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cautions which approaching railroad trains should take to avoid collision, and relegate their enforcement to the admiralty courts.

"'It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national.' Chief Justice Taney in the St. Lawrence, 1 Black, 522, 526, 527 [17 L. Ed. 180]; The Lottawanna, 21 Wall. 558, 575, 576 [22 L. Ed. 654]. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted." [36]

This subject has been considered by the Supreme Court in connection with the statute limiting the liability of a vessel owner for torts of his ship or crew to the value of the ship. This act was passed on March 3, 1851, 9 Stat. 635 (U. S. Comp. St. §§ 8020–8027). In Norwich & N. Y. Transp. Co. v. Wright,[37] it is said to have originated in the maritime law of modern Europe. In the SCOTLAND,[38] the court, repeating what it had said in the LOTTAWANNA,[39] says that the foreign maritime codes and compilations were operative in any country only so far as that country chose to adopt them, and not as authority per se; but that Congress could adopt such a principle into our law from the general body of maritime law. In EX PARTE PHENIX INS. CO.,[40] an application was made for the benefit of this limitation against a fire on land started by a passing steamer. The court held, however, that the limitation was only intended to protect against such causes

[36] Butler v. Boston & S. S. S. Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017.

[37] 13 Wall. 104, 20 L. Ed. 585.

[38] 105 U. S. 24, 26 L. Ed. 1001.

[39] 21 Wall. 558, 22 L. Ed. 654.

[40] 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274.

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of action as the district court could have heard on libel in rem or in personam, and a loss consummate on land was not one of these. In other words, this case settled that the limitation could only be pleaded against such causes of action as were in their nature maritime, no matter in what forum, state or federal, they were asserted.

Then came BUTLER v. BOSTON & S. S. S. CO.[41] There the act was invoked as a protection against a suit on account of the death of a passenger on Massachusetts waters, brought in a Massachusetts court under a Massachusetts statute. If this cause of action was not maritime by nature, and the Massachusetts act could not have given a remedy enforceable in the admiralty, it would have been the duty of the court, under the principles of EX PARTE PHENIX INS. CO., to have refused the benefit of the limited liability act against the suit as one of which a District Court would not have had original jurisdiction in admiralty. But the court decided that Congress had power to adopt the act from the Continental maritime codes, and to extend its protection to death cases, and that this power came from the admiralty and maritime clause of the Constitution, not from the commerce clause.[42]

This would settle the question that such a cause of action is maritime by nature, if it were not clear enough already. In the first part of this chapter it has been shown that the leading Continental maritime nations recognized such a right of action. If Congress can ingraft on our maritime law their limited liability act, it can, on the same principle, borrow their action for death injuries.

This reasoning is not affected by the later case of Richardson v. Harmon,[43] which held that nonmaritime causes of

[41] 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017.

[42] See, also, Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751.

[43] 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110.

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action could also be proved in a limited liability proceeding. It turned not upon the original limited liability act construed in ex parte Phenix Ins. Co., but on the amendment of June 26, 1884.[44]

If this reasoning and the above authorities establish that such a cause of action is maritime, two results follow:

(1) A state statute can be made to regulate the right, and can give it in personam or in rem, enforceable in the admiralty, or by an ordinary personal action in its own courts.

(2) An act of Congress may also regulate the subject, and in such case it would supersede the state statute, at least so far as foreign vessels are concerned, or as far as it would regulate the remedy in admiralty.*

[44] 23 Stat. 57 (U. S. Comp. St. § 8028); Appendix, post, p. 497.

* When this work was nearly through the press, Congress passed the following:

[Public—No. 165—66th Congress.]

[S. 2085.]

An Act Relating to the maintenance of actions for death on the high seas and other navigable waters.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Sec. 2. That the recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Sec. 3. That such suit shall be begun within two years from the

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In the concluding paragraph of the opinion in BUTLER v. BOSTON & S. S. S. CO., supra, the court reserves the question whether a state statute can have this effect. This was probably a mere cautious reservation of a question not directly involved, but the conclusion would seem to follow from the above authorities.

date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

Sec. 4. That whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

Sec. 5. That if a person die as the result of such wrongful act, neglect, or default as is mentioned in section 1 during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this Act for the recovery of the compensation provided in section 2.

Sec. 6. That in suits under this Act the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

Sec. 7. That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

Sec. 8. That this Act shall not affect any pending suit, action, or proceeding.

Approved, March 30, 1920.

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THE LAW GOVERNING

115. The right of action is governed by the law of the place where it arose; or by the law of the flag if it arose on the high seas; in so far as the relations of the parties under the flag are concerned.

If the death occurs from a collision between two vessels of different flags, there is no right of action by those fatally injured on one vessel against the other vessel, where the collision occurs on the high seas.

It is an important question what law governs in such cases. A state statute would regulate any such occurrence on the waters within its jurisdiction, and any negligent killing on the high seas of any one on a vessel would be governed by the laws of the vessel's hailing port as far as those aboard are concerned.[45]

It is a favorite principle of admiralty that its rights of action follow a ship around the world, and may be enforced in any port. This is true as to personal injuries, and in such cases the court enforces the law of the place where

[45] McDonald v. Mallory, 77 N. Y. 546, 33 Am. Rep. 664; Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264 (a collision between two ships of the same flag, where the law common to both was applied): La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973 (a French ship, where the French law was applied in favor of those aboard); Bjolstad v. Pacific Coast S. S. Co. (D. C.) 244 Fed. 634; International Nav. Co. v. Lindstrom, 123 Fed. 475, 60 C. C. A. 649. In Davidson v. Hull, [1901] 2 K. B. 606, which was a collision on the high seas between a Norwegian and an English vessel, causing the death by drowning of one of the Norwegian's crew, it was held that a suit would lie against the English vessel. The question turned, however, mainly on the construction put on the English act of Parliament as a question of intent, and not on any application of the principles of Conflict of Laws.

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the cause of action arose, or the law of the flag if it arose on the high seas, and if shown what that law is.[46]

But cases often arise where vessels of different flags collide. In such case the rights of injured parties against their own ship are governed by their flag; but there is no remedy against the other ship, under the doctrine of Conflict of Laws that, if the laws are different, neither law would be applied.[47]

EFFECT OF CONTRIBUTORY NEGLIGENCE

116. Contributory negligence bars recovery.

There is one anomaly in the decisions on the subject. Although the doctrine finds its place in the admiralty law only from the fact that it is maritime by nature, it is held that, even in the admiralty courts in suits for such causes of action contributory negligence bars recovery.[48]

Admiralty courts have their own doctrine on the subject of contributory negligence. In collision cases, where both are negligent, the damages are equally divided.

In personal injury cases, not fatal, the damages are divided, not equally, but much as the judge may think equitable, considering the circumstances and the relative fault of the parties.[49]

[46] Lamington (D. C.) 87 Fed. 752; Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; Manning v. International Mercantile Marine Co., 212 Fed. 933, 129 C. C. A. 453.

[47] Middlesex (D. C.) 253 Fed. 143; Sagamore, 247 Fed. 743, 159 C. C. A. 601.

§ 116. [48] Robinson v. Detroit & C. Steam Nav. Co., 73 Fed. 883, 20 C. C. A. 86; Quinette v. Bisso, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303.

[49] Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586, and cases cited.

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In other words, in all other admiralty cases contributory negligence reduces recovery, but does not defeat it. But in this case the rigid doctrine of the common law as to contributory negligence is applied.

CONSTRUCTION OF PARTICULAR STATUTES

117. Assuming the power of legislation over the subject, state or federal, as defined in the above discussion, the question whether any given statute gives a remedy in rem is a matter of construction.

Statutes worded substantially as Lord Campbell's Act are usually construed as not so intended. It has been seen that the House of Lords so construed it in the VERA CRUZ,[50] and that the Supreme Court so construed the Louisiana statute in the CORSAIR.[51] Judge Benedict placed a similar construction on the New York statute in the Sylvan Glen.[52] And Judge Hughes so construed the Virginia statute in the Manhasset.[53] Since that decision the Virginia statute has been amended, and the Circuit Court of Appeals for this circuit has held that in its present form, as found in section 2902 of the Virginia Code of 1887, it gives the right of procedure in rem.[54]

The Washington statute is held to give no right in rem.[55]

§ 117. [50] 10 A. C. 59.
[51] 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.
[52] (D. C.) 9 Fed. 335.
[53] (D. C.) 18 Fed. 918.
[54] Glendale (D. C.) 77 Fed. 906; Id., 81 Fed. 633, 26 C. C. A. 500.
[55] Alaska (D. C.) 225 Fed. 645.

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CHAPTER XI

OF TORTS TO THE PROPERTY, AND HEREIN OF COLLISION

118. Rules for Preventing Collisions, the Different Systems, and the Localities where They Apply.
119. Preliminary Definitions.
120. Distinctive Lights Prescribed for Different Vessels.
121. Sound Signals in Obscured Weather.
122. Speed in Obscured Weather.
123. Precautions when Approaching Fog Bank.
124. Steering and Sailing Rules in Obscured Weather.

RULES FOR PREVENTING COLLISIONS, THE DIFFERENT SYSTEMS, AND THE LOCALITIES WHERE THEY APPLY

118. There are four different sets of navigation rules which American courts may have to administer, namely, the International Rules, the Inland Rules for Coast Waters, the Lake Rules, and the Mississippi Valley Rules.

The torts most prolific of litigation in the admiralty are collisions between vessels. To that cause is due the loss of many lives, with untold valuable property. Until the nineteenth century had more than half elapsed, there were no rules regulating the duties of approaching vessels, and navigation was a happy-go-lucky experiment, in which the unfortunate seafaring man was at the mercy not only of his own captain, but of the commanders of approaching vessels as well.

The common acceptation of the word "collision" in marine law is the impact of two or more vessels.[1]

§ 118. [1] Burnham v. China Mutual Ins. Co., 189 Mass. 100, 75 N. E. 74, 109 Am. St. Rep. 627; Newtown Creek Towing Co. v. Ætna Ins.

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The earlier statutes contented themselves with requiring vessels to carry lights at night, for until 1838, even in this country, that was not a matter obligatory, though the courts had held that under the circumstances of particular cases it was required of a moving vessel to show a light on approaching another vessel as a precaution demanded of a prudent navigator.[2]

In England, though special statutes had prescribed rules for special cases, no code of rules intended to regulate the navigation of vessels in relation to each other was promulgated until under the statute of 25 & 26 Vict., the regulations prescribed by the orders in council were put in force as of June 1, 1863. These were intended to prescribe not only the lights which vessels must carry at night, but all possible contingencies, including their duties in a fog, the relative duties of steamer to steamer, sail to sail, and steamer to sail. They were enacted in substantially the same form by Congress on April 29, 1864, and constitute section 4233, Rev. St. U. S.[3]

These rules, however, though regulating lights, and the proper methods of steering and sailing, prescribed no signals except during fog. This defect in our country was remedied by the board of supervising inspectors, who, by virtue of authority conferred on them by section 4412, Rev. St., U. S. Comp. St. § 8166 (to establish regulations to be observed by steam vessels in passing each other, copies

Co., 163 N. Y. 114, 57 N. E. 302; Cline v. Western Assur. Co., 101 Va. 496, 44 S. E. 700; Chandler v. Blogg, [1898] 1 Q. B. 32; Margetts & Ocean Accident & Guarantee Ass'n, In re, [1901] 2 K. B. 792. But if we take the Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727, literally, it looks as if the Supreme Court included in the term the striking of a Mississippi mud bank!

[2] Osprey, 1 Spr. 245, Fed. Cas. No. 10,606. Louisiana, 21 How. 1, 16 L. Ed. 29; 1 Parsons, S. & A. 550.

[3] They are now in the main the Mississippi Valley rules, though amended in many particulars since 1864. U. S. Comp. St. §§ 7942–7974.

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of such regulations to be posted in conspicuous places on such steamers), provided signals by whistle, which enabled masters of approaching vessels to indicate to each other their exact intentions. These rules governed all vessels in American waters—even foreign vessels.[4] Though admirable in their general scope, they were yet far from perfect, and the next advance was the enactment of the International Rules of 1885. They went into force in this country on March 3, 1885, but they were expressly limited to the high seas and coast waters. And so we had two sets of rules in force—the rules of 1864, embodied in section 4233, Rev. St., supplemented by the Supervising Inspectors' Rules, all applying only to inland waters, and the International Rules of 1885, applying to the high seas and coast waters.

In the DELAWARE,[5] the Supreme Court decided that the line between the two was the place of taking a local pilot; that everything on regular pilotage ground was inland, and everything outside was high seas or coast waters.

In 1889 representatives from the leading maritime nations met in Washington by invitation of our government, still further elaborated the code of navigation, and recommended to their respective principals to adopt the result of their deliberations. On August 19, 1890 (26 Stat. 320), Congress enacted it into law, to go into effect, however, at a time to be fixed by presidential proclamation.

In some particulars these rules were unsatisfactory, and they remained in a state of suspended animation till July 1, 1897.

They were further amended by Act May 28, 1894,[6] and Act June 10, 1896,[7] and on December 31, 1896,[8] the proc-

[4] Sarmatian (C. C.) 2 Fed. 911.
[5] 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.
[6] 28 Stat. 82. [7] 29 Stat. 381. [8] 29 Stat. 885.

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lamation of the President formally put them in force as of July 1, 1897.

These rules purported to apply to "the high seas and all waters connected therewith navigable by seagoing vessels." But its thirtieth article provided that nothing in them should interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters.

By Act Feb. 19, 1895,[9] Congress, acting under this saving clause, kept in force the rules found in section 4233, Rev. St., and the Inspectors' Rules supplementing them, for harbors, rivers and inland waters (not including the Great Lakes and their tributaries), declared them rules made by local authority, and directed the Secretary of the Treasury to define the lines between such waters and the high seas, which was done. But by Act June 7, 1897,[10] Congress codified the inland rules also, making them apply on all harbors, rivers, and inland waters, except the Great Lakes, the Red River of the North, and the waters emptying into the Gulf of Mexico. This act repealed sections 1 and 3 of Act Feb. 19, 1895, but left section 2 of that act (by which the Secretary of the Treasury was directed to define the lines between the high seas and inland waters) still in force. These rules went into effect on October 1, 1897. Both these rules and the International Rules were slightly amended by Act Feb. 19, 1900,[11] prescribing the lights required of steam pilot vessels.

Navigation on the Great Lakes is regulated by Act Feb. 8, 1895,[12] which applies to the Great Lakes and their connecting and tributary waters as far east as Montreal.

Navigation on the Mississippi river as far down as New Orleans, also on its tributaries and on the Red River of the

[9] 28 Stat. 672 (U. S. Comp. St. §§ 7971–7974).
[10] 30 Stat. 96 (U. S. Comp. St. §§ 7872–7909).
[11] 31 Stat. 30 (U. S. Comp. St. §§ 7845, 7846).
[12] 28 Stat. 645 (U. S. Comp. St. §§ 7910–7941).

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North, is governed still by the old rules found in section 4233, Rev. St., and amendments and the pilot rules for Western rivers supplementing them.

Hence the courts may be required to administer any one of four sets of rules:

(1) The International Rules for collisions on the high seas.

(2) The Inland Rules for collisions on coast waters or waters connecting therewith, inside of the dividing lines fixed by the Secretary of the Treasury.

(3) The Lake Rules for the Great Lakes and their adjacent streams.

(4) The Mississippi Valley Rules.[13]

And, besides all these, the courts have held that vessels navigating any given waters are bound to observe rules made by municipal or state authority for that locality.[14] For instance, a New York statute requiring boats navigating the East river to keep in mid-stream, away from the docks, so as to allow unimpeded ingress to them, has been held obligatory on vessels.[15]

Many ports abroad have their local rules, and these are enforced by the courts.[16]

Even local customs not emanating from legislative authority are binding.[17]

Though there are striking differences between these four

[13] In the Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751, Mr. Justice Brown gives a brief history of the adoption of the different rules. For the Order in Council putting the rules in effect as to English vessels, see [1896] P. 307.

[14] U. S. v. St. Louis & M. V. Transp. Co., 154 U. S. 247, 22 Sup. Ct. 350, 46 L. Ed. 520.

[15] Ivanhoe, 7 Ben. 213, Fed. Cas. No. 7,113; Bay State, 3 Blatchf. 48, Fed. Cas. No. 1,149; Favorita, 18 Wall. 598, 21 L. Ed. 856; Hartford (D. C.) 125 Fed. 559; Id., 135 Fed. 1021, 68 C. C. A. 230.

[16] Margaret, 9 A. C. 873; Spearman, 10 A. C. 276.

[17] Fyenoord, Swab. 374; VICTORY, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519; Agnella (D. C.) 198 Fed. 147.

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sets of rules, their general scheme is the same, and therefore the International Rules will be made the basis in this discussion, though attention will be directed to some of the more important differences. It will be found that they constitute a common language of the sea, by which approaching navigators, no matter what their nationality, may speak to each other in tones understood of all seafaring men. Under them, if followed, collisions need never occur, unless by some negligence or inattention which no rules can prevent; for in this, as in the other affairs of life, the personal equation cannot be completely eliminated.

In view of the adoption of these rules by the more important maritime nations, they constitute a communis jus, and govern ships of different flags as well as those of the same flag in collisions occurring out of the jurisdiction of any one nation, it being assumed in the absence of evidence to the contrary that the law is common to both ships. But if the law of the flags differs, each may obey his own law without being guilty of negligence.[18]

The court takes judicial notice of these International Rules, but any variation of them by any particular nation must, like any other foreign law, be proved as a fact.[19]

PRELIMINARY DEFINITIONS

119. The first aim of the rules is to classify, for the purpose of the regulations, steam vessels and sailing vessels and vessels under way, etc.

The relative duties of steam and sail vessels and of vessels under way and vessels at anchor are so different (as will appear hereafter) that the first effort of the rules is to distinguish these cases closely. Accordingly, in the prelimi-

[18] Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264.

[19] New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126.

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nary definition, every vessel under sail, though by build a steamer, is treated as a sail vessel, and every vessel under steam or propelled by machinery is considered a steam vessel. This latter definition would include electric or naphtha launches, which, indeed, as far as the local rules are concerned, are brought into the category of steam vessels by express act of Congress.[20] On the other hand, a broken-down steamer, slowly finding her way into port under sail, is, as to other vessels, considered a sail vessel.

So, too, in order to avoid any possible misunderstanding, a vessel, though her headway is killed in the water, is considered under way, unless she is at anchor, or tied to the shore, or aground. The reason is that, unless she is thus fastened to something, a turn of her engines may put her under way, and therefore she should be avoided.[21]

DISTINCTIVE LIGHTS PRESCRIBED FOR DIFFERENT VESSELS

120. The next aim of the rules is to indicate to other vessels the character and course and bearing of a neighboring vessel, and whether she is in motion. This is done by the use of distinctive lights, white and colored, in various combinations, for unincumbered steamers, incumbered steamers, sailing vessels, etc.

The first thirteen articles regulate the subject of vessels' lights.

After defining the word "visible" as meaning visible on a dark night with a clear atmosphere, it is provided that the lights prescribed shall be shown from sunset to sunrise, and

§ 119. [20] 29 Stat. 489 (U. S. Comp. St. § 8282); Nimrod, 173 Fed. 520; Southern (D. C.) 224 Fed. 210, 215.

[21] Burrows v. Gower (D. C.) 119 Fed. 616; George W. Elder, 249 Fed. 956, 162 C. C. A. 154; Romance, [1901] P. 15; Upton Castle, [1906] P. 147; Gladys, [1910] P. 13.

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that no others which could be mistaken for them shall be shown. This requirement, however, does not exempt a vessel from taking proper measures to avoid another without the lights if she can be seen, as is frequently the case just after sunset, or on a clear moonlight night, but it casts on the offending vessel the burden of showing that her offense not only did not, but could not possibly, have contributed to the accident.[22]

The first effort is to adopt distinctive lights for different classes of vessels, so that steamers unincumbered or with tows, sail vessels, small craft, and special kinds of vessels, like pilot boats and fishing vessels, can announce their character at a glance. This is accomplished by the use of white lights, colored lights, and flare-up lights in various combinations. The colored lights are carried on the sides of the vessel, the white lights on the line of the keel, and at an elevation.

(1) Unincumbered Steamers (Article 2)

An unincumbered steamer under way carries a white light well forward, at least twenty feet above the hull, strong enough to show five miles, but with a board behind it, so arranged that it cannot be seen from behind. In the language of the rule, it shows twenty points. As there are thirty-two points in all, this makes it show two points abaft the beam on each side; so that overtaking vessels cannot see this special light unless they are nearly up to a point abeam. This is called the "masthead light," and is the white light usually carried by seagoing vessels. This light, in the Inland Rules, need not be twenty feet above the hull.

Steamers, however, instead of carrying this single white light, are allowed the option of substituting two white lights. In this case an additional white light is placed aft amidships, at least fifteen feet higher than the bow light.

§ 120. [22] R. R. Kirkland (D. C.) 5 Hughes, 109, 48 Fed. 760; Tillie, 13 Blatchf. 514, Fed. Cas. No. 14,049; PENNSYLVANIA, 19 Wall. 125, 22 L. Ed. 148; Bougainville, L. R. 5 P. C. 316.

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In the International Rules, it is screened like the one forward; in the Inland Rules it shows all around the horizon. These two lights possess the important advantage of giving a range, and thus announcing the exact direction in which their bearer is moving. This is not important at sea, where there is plenty of room; but it is important in narrow, crowded, or devious channels, and hence the river and bay steamers usually adopt this plan. In the Lake Rules this is obligatory on steamers over 150 feet register length.

The colored lights prescribed for steamers are: On the starboard or right-hand side, a green light strong enough to be visible at least two miles, and fitted with screens, so arranged that it will not show backwards till an approaching vessel is within two points of abeam, and that it will not show across the ship; in other words, it must only show from right ahead to two points abaft the beam. On the port or left-hand side there is a red light screened in the same way. Thus a vessel moving right ahead in exactly the opposite direction would see both colored lights (or side lights as they are usually called) and the masthead light, or the two range lights in line, would know that she was meeting a steamer, and would govern herself accordingly.

In the Mississippi Valley Rules, steamers carry simply the colored lights, attaching them to their respective smokestacks, and arranging them to show only forward and abeam.[28]

(2) Steamers with Tows (Article 3)

Let us now suppose that our steamer takes another vessel in tow. How does she announce the fact to her marine neighbors? She accomplishes it by additional white lights. If she uses the masthead light, she hangs another one six feet under it, and screened just like it, and still another if

[28] See Pilot Rule No. 10 for Western Rivers.

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her tow consists of more than one vessel, and is over 600 feet long.

Here there is a slight difference between the International Rules and the Local Rules. Under the latter she puts the additional light or lights under the after-range light, three feet apart, and uses for the purpose lights which, like it, show all around the horizon. Tugs in harbor work use this latter rig.

These lights must be strictly one over the other.[24]

The Lake Rules require only one towing light, no matter how long the tow, and a special light if the tow is a raft.

The Mississippi Valley Rules (where unincumbered river steamers have no white lights) require two vertical towing lights forward, arranged to show an arc like the masthead lights.

Hence an approaching vessel, seeing these "towing" or "vertical" lights, as they are usually called, knows that it is meeting a steamer with a tow, and must regulate its navigation not only in reference to the tug, but the other vessel behind it.

(3) Special Lights (Article 5)

Vessels not under command carry two vertical red lights at night, showing all around the horizon, or two black balls by day; and vessels laying telegraph cables have peculiar lights, warning other vessels of their mission. The Inland Rules, Lake Rules, and Mississippi Valley Rules have no corresponding lights or balls.

This means not under command from some accidental cause, and would not cover the case of a vessel hove to, or not under, immediate command voluntarily.[25]

Nor would it apply to a steamer partially disabled, but still moving slowly and steering.[26]

[24] Foster v. Merchants' & Miners' Transp. Co. (D. C.) 134 Fed. 964.

[25] Burrows v. Gower (D. C.) 119 Fed. 616; Bellanoch, [1907] A. C. 269.

[26] P. Caland, [1893] A. C. 207.

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(4) Sail Vessels and Vessels Towed (Article 5)

These carry the two colored or side lights prescribed for steamers, and no others. Hence a mariner seeing only a colored light or lights on a vessel knows that it is a sail vessel, or a vessel towed. If, at a second glance, he sees no steamer in front showing the tow lights just described, he knows it is a sail vessel.

(5) Small Vessels (Article 6)

These can carry movable colored lights and show them to an approaching vessel. The International Rules and the Lake Rules do not define what is meant by a small vessel; the corresponding inland rule defines it as a vessel of less than ten gross tons.

By the Act of June 9, 1910,[27] Congress made special provision for "motor boats," which were defined as "every vessel propelled by machinery and not more than sixty-five feet in length, except tugboats and towboats propelled by steam."

The rig of their lights varies with their size; the smaller type having a white light aft to show all around the horizon, and a combined lantern for the green and red lights, and the two larger sizes having two white lights, fixed to give a range, and the colored lights on each side, as usual.

(6) Small Steam and Sail Vessels and Open Boats (Article 7)

Steam vessels under 40 tons and sail vessels or oar vessels under 20 tons gross may elect a different rig under the international rule. The steamers may have a small white light forward and a combined lantern, showing red and green on the proper sides, behind the white light, and below it; the sail or oar vessel may have a similar combination green and white light, to be exhibited on the approach of another vessel; and rowboats may have a white lantern to be shown when needed. The corresponding inland rule omits this provision except for rowboats. The Lake Rules

[27] 36 Stat. 462 (U. S. Comp. St. § 8277).

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permit a combined lantern on open boats, and the Mississippi Valley Rules permit it on boats under ten tons propelled by gas, fluid, naphtha, or electric motors.

(7) Pilot Vessels (Article 8)

These show a white light at the masthead, visible all around, and a flare-up light every fifteen minutes, to attract attention. When not on their station, they exhibit the ordinary lights. If it is a steam pilot boat on its station, it must, by the Act of February 19, 1900,[28] amending the International Rules and Inland Rules, show a red light immediately under the masthead light, and visible all around, with the colored side lights if not at anchor, and without them if at anchor.

(8) Fishing Vessels (Article 9)

The International Rule on this class is not of interest. The corresponding Inland Rule provides, in substance, that when not fishing they carry the ordinary lights, and when fishing they use a special rig.

The International Rules make no provision for a large class of craft common in American waters, such as rafts, mud scows, etc. The Inland Rules leave this to the supervising inspectors. By Act of March 3, 1893,[29] this power had been expressly conferred on the supervising inspectors as far as barges and canal boats were concerned. Accordingly, at their session in 1894, they provided a multitude of rules for such boats towing tandem, or in tiers, or alongside, which it is hardly worth while to explain in detail. The mud scows so common around dredging machinery in our harbors are required to carry a white light at each end, not less than six feet above the deck. The Inland Rules and Lake Rules also empowered the supervising inspectors to make similar regulations.

[28] 31 Stat. 80 (U. S. Comp. St. §§ 7845, 7846).
[29] 27 Stat. 557 (U. S. Comp. St. § 7849).

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(9) Overtaken Vessels (Article 10)

It is obvious from the preceding explanations that a steamer rigged with the masthead light instead of the range white lights and a sail vessel or vessels in tow cannot be seen from behind, as all their lights are screened so as to show only forward. Hence this rule provides that the vessel being overtaken shall show from astern a white light or a flare-up light. They may fix this light permanently, or show it as long as the approaching vessel is an overtaking one;[30] but, if fixed, it must be about on a level with the side lights, and so screened as to show right back over an arc of twelve points, or 135 degrees.

The Lake Rules (No. 12) and the Mississippi Valley Rules require sail vessels, on the approach of any steamer during the night time, to show a lighted torch upon the point or quarter to which such steamer shall be approaching.

The language of this rule is broad enough to include a steamer approaching from any direction, whether the sail is at anchor or not. And, accordingly, there were several decisions of the inferior courts holding that the torch must be exhibited under all circumstances.[31]

But in the OREGON,[32] the Supreme Court held that the provision was intended to supply an obvious defect in the old rules in requiring no light shown to overtaking vessels, that this was its primary object, and that it did not apply to anchored vessels. If the side lights are good, it would not be necessary to show it to steamers approaching any point forward of the beam.[33]

[30] John Bossert (D. C.) 148 Fed. 903; 168 Fed. 1021, 93 C. C. A. 671; Bernicia (D. C.) 122 Fed. 886; Main, L. R. 11 P. D. 132; Essequibo, L. R. 13 P. D. 51. The binnacle light is not a sufficient compliance with the rule. Patroclus, 13 P. D. 54.

[31] Lizzie Henderson (D. C.) 20 Fed. 524; Algiers (C. C.) 28 Fed. 240.

[32] 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943.

[33] Brigham v. Luckenbach (D. C.) 140 Fed. 822.

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In any event, the International and Inland Rules require it to be shown only to overtaking vessels,[84] except as an extra precaution under article 12.[85]

(10) Anchor Lights (Article 11)

This is an important light in roadsteads and harbors. It is a white light, placed in the rigging so as to be visible all around the horizon for a distance of at least one mile. Vessels under 150 feet long must not carry it over 20 feet above the hull; vessels over that length carry it from 20 to 40 feet above the hull. If the vessel is over 150 feet long, then there must be an extra light astern. It need not necessarily be forward of the foremast, but may be in the forerigging, if the view is unobstructed all around.[86] A vessel must show her anchor light if in navigable water, though outside the channel as marked by the buoys.[87]

SOUND SIGNALS IN OBSCURED WEATHER

121. Distinctive sound signals are prescribed for different vessels as precautions in obscured weather, to be used when the obscuration is such that signals can be heard further than lights can be seen.

The Signals Required

Article 15 regulates these signals in case of obscured weather. Steamers navigating as such give them on their whistle or siren. Sail vessels in motion, or vessels being towed, give them on a fog horn.

[84] Algiers (D. C.) 38 Fed. 526. The Oregon case was decided prior to the rules of 1897. Article 12 was added by these rules, and made the exhibition of the flare light optional, not compulsory. Martha E. Wallace (D. C.) 148 Fed. 94.

[85] Excelsior (D. C.) 102 Fed. 652; Robert Graham Dun, 107 Fed. 994, 47 C. C. A. 120.

[86] Philadelphian, [1900] P. 262.

[87] Oliver (D. C.) 22 Fed. 848.

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For a long time the horn used on sail vessels was an ordinary tin horn, blown by the breath. But this was too unreliable, and so since the rules of 1885 it has been required to be sounded by "mechanical means." Those now in use are a box containing a bellows worked by a crank. The blast that they give is sufficient to be heard a long distance. So particular are the courts to require its use that, if a mouth horn is used, and a collision occurs, the court will require the offending vessel to show not only that this negligence might not have contributed to the collision, but could not possibly have done so.[88]

While a vessel is not required to carry a spare mechanical horn, and may use a mouth horn, in case of an accidental breakdown of the other, she is required to exercise reasonable care to keep her mechanical horn in order, and is liable for the use of a mouth horn in case she does not do so.[89]

The Inland Rules and Lake Rules merely require an "efficient fog horn," and do not require it to be sounded "by mechanical means."

The Mississippi Valley Rules do not require a steamer to carry a fog horn, and do not require the fog horn carried by sailing vessels to be sounded by mechanical means.

By the International Rules unincumbered steamers in motion sound one blast every two minutes, by the Inland and Mississippi Valley Rules they sound one blast every minute, and by the Lake Rules three blasts every minute.

By the International, Inland, and Lake Rules sail vessels blow their horns, according to the bearing of the wind, one blast for the starboard tack, two for the port, and three for the wind abaft the beam.

§ 121. [88] MARTELLO, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637; Hercules, 80 Fed. 998, 26 C. C. A. 301.

[89] Kenilworth (D. C.) 64 Fed. 890; Niagara, 84 Fed. 902, 28 C. C. A. 528; Trave, 68 Fed. 390, 15 C. C. A. 485.

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The Weather in Which Signals Required

As to the weather in which those signals should be given, the first law required it in "fog or thick weather." Accordingly, under those rules, it was held that they need not be given in snow storms.[40]

The International Rules of 1885 extended the requirements of signaling to "fog, mist, or falling snow"; and the present rules extend it to "fog, mist, falling snow, or heavy rain storms," showing a constantly increasing vigilance. The Lake Rules are equally rigid.

A mere haze in the atmosphere could hardly come under the term fog. Perhaps the best definition is given in the MONTICELLO,[41] in which Judge Lowell says: "What is a fog, such as the statute intends? Is it every haze, by day or night, of whatever density? To give the statute a reasonable interpretation, we must suppose that its intent is to give to approaching vessels a warning which the fog would otherwise deprive them of. By day there must be fog enough to shut out the view of the sails or hull, or by night of the lights, within the range of the horn, whistle, or bell. It means that a safeguard of practical utility under the circumstances should be provided. If it be entirely plain, under the evidence, that the ordinary signals are sufficient, and more efficacious than the horn could be, the horn will not be required. But a serious doubt upon that point must weigh against the vessel failing to comply with the statute. I do not consider it to be enough to aver and prove that the lights might be seen in time to avoid serious danger; but, where it is evident that the fog signal could not have been so useful as the ordinary signal, it need not

[40] Rockaway (C. C.) 25 Fed. 775.

[41] 1 Low. 184, Fed. Cas. No. 9,739. For application of the rule to other obscurations of the atmosphere than fog, see Merchants' & Miners' Transp. Co. v. Hopkins, 108 Fed. 890, 48 C. C. A. 128; Baltimore Steam Packet Co. v. Coastwise Transp. Co. (D. C.) 139 Fed. 777 (a "Scotch mist"). Virginia (D. C.) 203 Fed. 351.

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be used. Thus, if the lights could be plainly and easily made out a mile, and the fog horn could not be heard at a third or a quarter of that distance, I cannot suppose that such a state of the atmosphere would amount to a fog in the sense of the law. It is to guard against some danger which the fog would or might cause, and from which the horn might possibly guard, that it is to be blown."

This, in substance, means that, if the weather is such that the whistles can be heard further than the lights can be seen, the signals should be given. As modern whistles are very powerful, and the side lights are required to show two miles, the logical deduction from this is that, if the mariners cannot see two miles, they should give the additional warning of the signals. In practice this is not done. And yet, when we consider that two vessels, each moving fifteen miles an hour (not a fast rate for modern steamers), are, when two miles apart in distance, only four minutes apart in time, we see that but little time is left for reflection. The distance at which vessels give the passing signals (explained later on) is usually taken as half a mile. At this distance, if each is moving fifteen miles an hour, they are only a minute apart in time.

Vessels at anchor ring every minute (every two minutes by the Lake Rules) a bell for five seconds. Towing vessels, and vessels under way, though not under command, give every two minutes a signal of one long blast, followed by two short ones. It is optional with vessels in tow whether to give this signal or not, but they shall not give any other. Small sailing vessels or boats may give these or not, but must make some good noise.

By the Lake Rules towing steamers give the same signals as free steamers, and the tow must also give signals with her bell. And steamers with rafts give frequent screech or Modoc whistles.

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SPEED IN OBSCURED WEATHER

122. In obscured weather vessels must go at a moderate speed, taking all circumstances into consideration.

Article 16 lays down the vital and essential rule for fogs. It provides that every vessel shall go at a moderate speed, having careful regard to the existing circumstances and conditions. This term "moderate speed" is elastic in its meaning, and has been the subject of much judicial discussion. It varies to some extent with the character of the vessel, and to a very great extent with the character of the locality. A speed that is moderate on the high seas out of the usual track of navigation would be highly dangerous in harbors or their approaches. A moderate speed for a steamer would be an immoderate one for a sail vessel. A speed that is moderate when you can see a mile would be excessive when you can see a hundred yards.

It would be impossible to review even a small part of the decisions on this subject. We must content ourselves with elucidating a few general principles.

Requirement of Moderate Speed Applies Alike to Sail and Steam Vessels

The requirement applies as well to sail vessels as to steamers. In a fog they must not only give their signals properly, but they must shorten sail until their speed is just sufficient for steerage way. As they have no means of stopping and backing, like steamers, it is the more incumbent on them to obey this rule.

In the George Bell,[42] which was a collision on the Banks, the fog was such that they could see for 300 yards. The

§ 122. [42] 3 Hughes, 468, Fed. Cas. No. 5,856. Instances of immoderate speed in sailing vessels. Chattahooche, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801; David Crockett (D. C.) 84 Fed. 698; Sif (D. C.) 157 Fed. 454; Oceania Vance, 233 Fed. 77, 147 C. C. A. 147.

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court held that a speed of five miles an hour was too fast, due to the fact that the ship was carrying its main sail and mizzen sail.

In the well-considered English case of the ZADOK,[43] a sailing vessel was held at fault which was carrying practically all her canvas; and the true criterion was announced to be the ability to steer.

"It is the duty of the ship, whether she be a sailing vessel or a steamer, to moderate her speed as much as she can, yet leaving herself with the capacity of being properly steered."

Steamers must Go so Slow in Frequented Waters as to be Able to Stop on Seeing Other Vessel

The rule requires the speed of steamers to be such that they can stop on seeing the approaching vessel, assuming her also to be going at a moderate speed. This seems to be the result of the recent decision of the UMBRIA,[44] which reviews the question of fog speed and fog maneuvers at length. Despite the high authority of the court, and the special respect which marine lawyers pay to the opinions of Mr. Justice Brown, this does not seem to be a satisfactory or practical test. In the first place, it makes us measure a man's conduct by the motions of the other vessel, which he could not have known at the time; and we are, therefore, trying him on facts developed long afterwards in the court room, and not on the facts as they appeared to him.

In the next place, the fog may be so thick that one can hardly see the stem of his own vessel, much less an approaching vessel, even though only a few yards off. Hence the rule, carried to its logical consequences, would require the vessel to anchor, and then, as Mr. Justice Clifford says in the Colorado,[45] she is in danger from vessels astern.

[43] 9 P. D. at page 116.
[44] 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053.
[45] 91 U. S. 692, 23 L. Ed. 379.

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In the next place, it is a very uncertain test. Different steamers can stop in different distances, depending on the power of their engines. Hence this test implies that the navigator must know the handiness of the other steamer as well as his own.

The rule, though expressed in broad terms in the cases, has been applied in its strictness only to collisions happening in much-traveled lanes of navigation. It would be carrying it to extremes to apply it literally to the entire expanse of the high seas.[46]

There is another rule, simpler, dependent on knowledge of his own vessel only, and in its practical results much safer. It is laid down in the ZADOK CASE, above cited, and in many Supreme Court cases before the UMBRIA. It cannot be better expressed than to quote Justice Clifford's opinion in the Colorado:[47] "Very slow speed, just sufficient to subject the vessel to the command of her helm." In the MARTELLO,[48] the Supreme Court says that the vessel must "reduce her speed to the lowest possible point consistent with good steerageway."

As samples of what speed the courts consider immoderate, we might cite the PENNSYLVANIA,[49] where a speed in a steamer of seven miles an hour at a point two hundred miles out at sea, but in the track of navigation, was condemned; and the MARTELLO,[50] where a speed of six miles an hour in the lower harbor of New York was thought too fast.

[46] Dordogne, 10 P. D. 6; Moore, Rules of the Road, 38; Marsden, Collision, 355, 357.

[47] 91 U. S. 692, 23 L. Ed. 379.

[48] 153 U. S. at page 70, 14 Sup. Ct. 723, 38 L. Ed. 637.

[49] 19 Wall. 125, 22 L. Ed. 148.

[50] 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637. See, also, La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; Beaver, 219 Fed. 134, 135 C. C. A. 32; affirmed 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726; also 253 Fed. 312, 165 C. C. A. 94; Quinette v. Bisso, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303; Nord-

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PRECAUTIONS WHEN APPROACHING FOG BANK

123. Vessels approaching fog banks are bound to use the precautions of sound signals and moderate speed.

As the object of fog signals and slow speed is the protection of other vessels, the law requires a vessel to take these precautions as she approaches a fog bank, and even before she enters it, for she cannot know what is in the bank ahead of her.[51]

The laws of acoustics are so little understood, and the failure to hear signals in fog so inexplicable, that such failure is not negligence under the decisions.[52]

STEERING AND SAILING RULES IN OBSCURED WEATHER

124. The rules do not apply when vessels are not and cannot be aware of each other's proximity, but they apply when they have definitely located each other, though not so rigidly, and the special precaution rule has more scope.

In a fog, when vessels cannot see or locate each other, the ordinary steering and sailing rules do not apply, for they presuppose a knowledge of the other vessel's character, bearing, and course, which cannot be known in fog.[53]

amerika (D. C.) 191 Fed. 997; Sagamore, 247 Fed. 743, 159 C. C. A. 601.

§ 123. [51] Milanese, 4 Asp. 438; Perkiomen (D. C.) 27 Fed. 573; Julia Luckenbach (D. C.) 219 Fed. 600, affirmed Indra Line v. Palmetto Phosphate Co., 239 Fed. 94, 152 C. C. A. 144; St. Paul [1909] P. 43.

[52] Spencer, Marine Coll. 138, 139. Columbia (D. C.) 104 Fed. 105; Curran, [1910] P. 184.

§ 124. [53] August Korff (D. C.) 74 Fed. 974; Celtic Monarch (D. C.) 175 Fed. 1006, 1008; Geo. F. Randolph (D. C.) 200 Fed. 96.

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The passing signals under article 28 of the International Rules and article 18, rule 8, of the Inland Rules, are expressly limited to cases when the vessels are in sight of one another.[54]

"But it is urged that the Negaunee, being on the port tack, was, under the seventeenth rule of section 4233, Rev. St., required to keep out of the way of the Portch; that the Portch had the right of way, and was to hold her course, and it was the Negaunee's duty to give the way or turn out; and this rule would be aptly invoked if the proof showed that those in charge of the Negaunee had sufficient notice of the proximity of the Portch to enable them to execute the proper movements to give the Portch the way. The proof, however, shows, as I have already said, that at the time the Negaunee's officers were apprised of the presence of the Portch they were so near together, and a collision so imminent, that it was futile to attempt to keep out of the way; and it seems to me that, under the circumstances, rule seventeen was inoperative, and rule twenty-four of the same section, which required that due regard must be had to all the dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from the general rules necessary in order to avoid immediate danger, became the guide of both parties; that is, that each party, under an unexpected impending peril, must do what he can promptly to avoid it." [55]

"But when you speak of rules which are to regulate the conduct of people, those rules can only be applied to circumstances which must or ought to be known to the parties at the time. You cannot regulate the conduct of people as to unknown circumstances. When you instruct people, you instruct them as to what they ought to do under circumstances which are, or ought to be, before them. When you

[54] Aurelia (D. C.) 183 Fed. 341; North Point (D. C.) 205 Fed. 958; Amagansett, 220 Fed. 827, 136 C. C. A. 437.

[55] Negaunee (D. C.) 20 Fed. 921.

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say that a man must stop and reverse, or, I will say, slacken his speed, in order to prevent risk of collision, it would be absurd to suppose that it would depend upon the mere fact of whether there was risk of collision, if the circumstances were such that he could not know there was risk of collision. I put some instances during the argument to show that that was so. The rule says that a steamer approaching another vessel ought to slacken her speed if, by going on, there would be risk of collision. But, suppose the night were quite dark, and the other ship was showing no light at all, it would be wrong to say, with regard to the conduct of those on the steamer, that when they have not the means of knowing, and could not possibly know, that there was another ship in their way, or near, they ought to see that the other ship was in the way or approaching, and that it is no excuse that they did not see them. Take another case: If two vessels are approaching, each on a different course, which will cause them to meet on a high headland, so that, until they are absolutely close, they cannot see each other, it is quite obvious that, if both are steamers, they ought, on the suggested reading of the rule, to stop and reverse. But how can you regulate their conduct if neither can see the other until they are close together? It is absurd to suppose that you could regulate their conduct, not with regard to what they can see, but to what they cannot see. Therefore the consideration must always be, in these cases, not whether the rule was in fact applicable, but were the circumstances such as that it ought to have been present in the mind of the person in charge that it was applicable?" [86]

[86] Beryl, 9 P. D. 138, 139.

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CHAPTER XII

THE STEERING AND SAILING RULES

125–127. Origin, Reasons on Which Based, and General Application.
128. Sail Vessels.
129. Steamers—The Port-Helm Rule.
130. The Crossing Rule.
131. Steam and Sail.
132. Privileged Vessels.
133. Crossing Ahead.
134. The Stop and Back Rule.
135. Overtaking Vessels.

ORIGIN, REASONS ON WHICH BASED, AND GENERAL APPLICATION

125. Rules of navigation are the outgrowth of customs.

126. They are evolved from the comparative ease of handling different types of vessels, the rule of turn to the right, and the question whether there is risk of collision.

127. They regulate the relations of sail to sail, steam to steam, and steam to sail.

The fourth part of the navigation rules is the most important of all. It contains the steering and sailing rules, and prescribes the course which approaching vessels must take to avoid each other in every conceivable situation, and the signals to be given to indicate their respective intentions.

These rules, in the main, are not new. They are largely affirmations of previous maritime customs, crystallized at last into positive enactments.

Reasons on Which Based

There are three underlying principles from which they are derived, for they are based on reason, and any one

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fixing firmly in his mind the reasons which gave them birth can, if gifted with a moderate knowledge of navigation and ship construction, think them out for himself.

(1) The first of these principles is that the less manageable type of vessel is privileged as regards the more manageable, and the latter has the burden of avoiding her. For example, sailing vessels are favored as against steamers, anchored vessels as against moving vessels, and vessels close-hauled as against vessels with a free wind.

(2) Other things being equal, the rule of the road at sea is the same as on land; and the endeavor of these navigation rules is to make vessels, wherever possible, always pass to the right, like two vehicles on a public road.

(3) The rules are only intended to apply when vessels are approaching each other in such directions "as to involve risk of collision." A detailed examination of the rules will show that this qualifying phrase is embodied in nearly every one of them. The mere fact that vessels are in sight of, or near, each other, navigating the same waters, does not bring these enactments into play. If their courses are parallel, and sufficiently far apart to clear with a safe margin, or if they are divergent, there is no need for rules of navigation, just as there is no need for rules of construction when the language is too plain to need construction.

Risk of Collision

In the language of Justice Clifford in the Dexter,[1] the rules are obligatory if the vessels are approaching in such directions as involve risk of collision on account of their proximity from the time the necessity for precaution begins.

In the Milwaukee,[2] it is said: "Risk of collision begins the very moment when the two vessels have approached

§§ 125–127. [1] 23 Wall. 69, 23 L. Ed. 84.

[2] 1 Brown, Adm. 313, Fed. Cas. No. 9,626. See, also, Philadelphia (D. C.) 199 Fed. 299, affirmed 207 Fed. 936, 125 C. C. A. 384. There is no risk of collision when the vessels have reached an understand-

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so near each other, and upon such courses, that, by departure from the rules of navigation, whether from want of good seamanship, accident, mistake, misapprehension of signals, or otherwise, a collision might be brought about. It is true that prima facie each man has a right to assume that the other will obey the law. But this does not justify either in shutting his eyes to what the other may actually do, or in omitting to do what he can to avoid an accident made imminent by the acts of the other. I say the right above spoken of is prima facie merely, because it is well known that departure from the law not only may, but does, take place, and often. Risk of collision may be said to begin the moment the two vessels have approached each other so near that a collision might be brought about by any such departure, and continues up to the moment when they have so far progressed that no such result can ensue."

The preliminary to the steering rules gives one test by which to determine whether risk of collision exists. It is that the compass bearing of the approaching vessel does not change. If their courses are parallel, a sharp angle at a distance becomes larger as they approach, and, conversely, if the angle remains constant, their courses must be converging.[8]

SAIL VESSELS

128. Which of two sailing vessels approaching each other so as to involve risk of collision must keep out of the way of the other is determined by their respective courses and situations, with reference to the direction of the wind and their relative positions.

ing by signals, or are moving on courses that would take them clear by a safe margin. Lake Erie Transp. Co. v. Gilchrist Transp. Co., 142 Fed. 89, 73 C. C. A. 313; Libra, 6 P. D. 139.

[8] George W. Roby, 111 Fed. 601, 49 C. C. A. 481; President Lincoln, [1911] P. 248.

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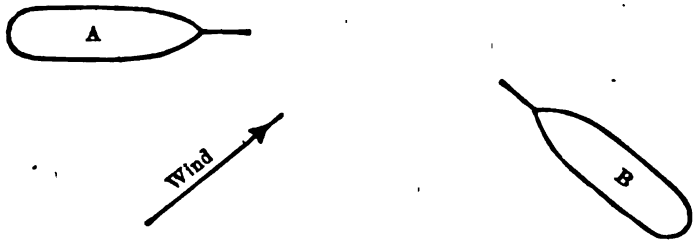
Sail vessels approaching each other so as to involve risk of collision regulate their movements as follows:

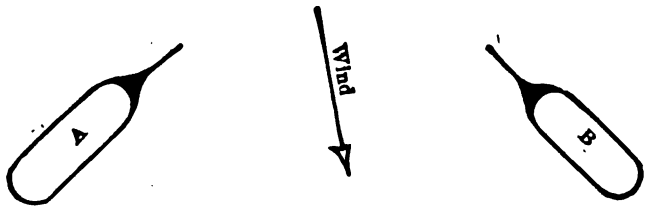
(a) A vessel which is running free shall keep out of the way of a vessel which is closehauled.

This is because she is more manageable. The wind is free when the vessel could shape her course still further to windward. Thus:



A must keep out of the way of B.[4]

(b) A vessel which is closehauled on the port tack shall keep out of the way of a vessel which is closehauled on the starboard tack. When a vessel is on the port tack, her sails swing over the starboard side, the wind being on her port side, and vice versa. Hence this rule is based on the principle of turn to the right. The vessel closehauled on the starboard tack cannot turn to the right, as the wind is on that side; therefore the other one must. Thus:



§ 128. [4] William Churchill (D. C.) 103 Fed. 690; Metamora, 144 Fed. 936, 75 C. C. A. 576; Martha E. Wallace (D. C.) 148 Fed. 94.

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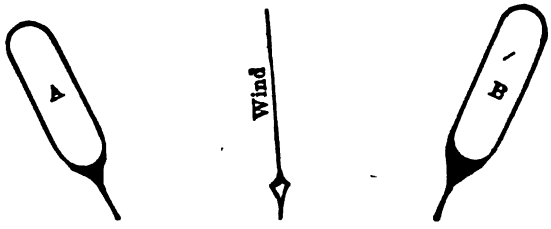
A must keep out of the way.[5]

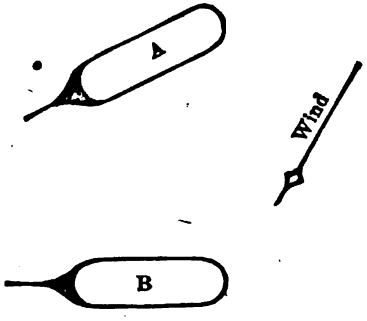
(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other. This also springs from the rule of turn to the right. Thus:



A must keep out of the way, because the wind facilitates her porting or turning to the right, and interferes with the other's doing it.[6]

We will see later on that, with two steamers as in the diagram, the rule is the opposite. B then keeps out of the way, which she can do by porting, and passing astern, as a steamer is independent of the wind.

(d) When both are running free with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward. Thus:



[5] Ada A. Kennedy (D. C.) 33 Fed. 623; Margaret B. Roper (D. C.) 103 Fed. 886; Id., 111 Fed. 623, 49 C. C. A. 503; Mary Buhne, 118 Fed. 1000, 55 C. C. A. 494.

[6] Rolf, 47 Fed. 220; Id., 50 Fed. 478, 1 C. C. A. 534; Grace Seymour (D. C.) 63 Fed. 163.

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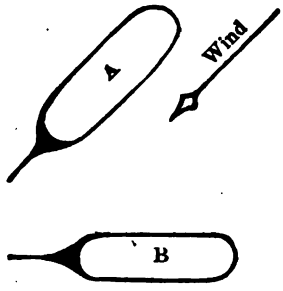
A keeps out of the way. He has the weather gauge, about which we read so much in naval warfare before the innovation of steamers.

This rule is based on the fact that the vessel to windward is the more manageable of the two.[7]

(e) A vessel which has the wind aft shall keep out of the way of the other vessel: Thus:



A keeps out of the way of B. The reason is that she is more manageable.[8]

STEAMERS—THE PORT-HELM RULE

129. Steamers, meeting end on, port their helms, and pass to the right, indicating their intention by one whistle each. But, if they are approaching well on each other's starboard bow, they starboard, and pass to the left, each blowing two whistles.

The use of sail vessels is becoming more restricted every year, and a vast proportion of the world's commerce is now carried in steamers. For this reason, collisions between steamers constitute the bulk of the cases which now find their way into the courts.

[7] Nahor (D. C.) 9 Fed. 213.

[8] Mary Augusta (D. C.) 55 Fed. 343; Gov. Ames, 187 Fed. 40, 109 C. C. A. 94.

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Article 18 embodies the first and most important rule of those governing steamers. It says that, when two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other. This is called the "port-helm rule," as it takes a port helm to make a ship move to starboard.

Under article 28, the steamer indicates her intention by blowing one short blast of about one second's duration, which is answered by the other steamer, and thus an understanding is established.

Under the old rules it was a matter of some doubt how near the steamers must be meeting end on in order to bring this rule into play. The present article in the explanatory paragraph following the navigation rule itself expresses the result of the decisions. If they are moving on courses that, if held, would pass clear, then there is no risk of collision, and no rule is necessary.[9] If, however, by day each sees the other's masts in a line with his own, or nearly so, or if by night each sees both side lights of the other, then they are moving right at each other, and each must port, and signify by his one blast that he is porting.[10]

If, on the other hand, it is a case of red light to red light, or green light to green light, the rule does not apply.[11]

The Lake Rule is the same, except that it has no explanatory note as to the cases to which the rule applies. But, as that note is a mere affirmation of the decisions, the courts would probably apply it.

Both the Lake Rules and the Mississippi Valley Rules, as supplemented by the Supervising Inspectors' Regulations, are much influenced by the necessity of allowing for

§ 129. [9] City of Macon, 92 Fed. 207, 34 C. C. A. 302; Rend, In re (D. C.) 126 Fed. 564; Esparta, 160 Fed. 289, 87 C. C. A. 413.

[10] Thingvalla, 48 Fed. 764, 1 C. C. A. 87.

[11] Manitoba, 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095; Wrestler (D. C.) 198 Fed. 583.

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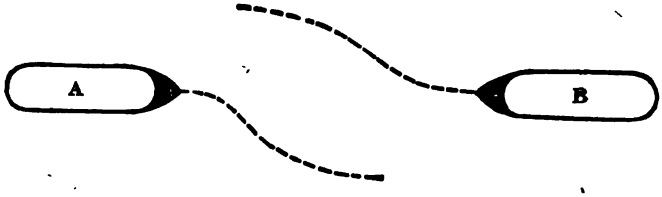
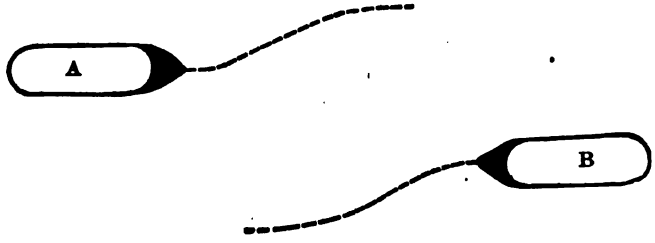
the effect of the current on ease of navigation. It is a general principle that a boat moving against the current is more manageable than one moving with it, and that the latter should have the greater rights.[12]

The Inland Rules, so far as they apply to steamers, go into much more detail than the International Rules. The one corresponding to the port-helm rule expressly provides that vessels meeting so far on each other's starboard side as not to be considered head and head may give two blasts, and starboard. The port-helm rule may be illustrated thus:



The starboard-helm rule may be illustrated thus:[13]



The Inland Rules contain other provisions under this article not found in the International Rules. For instance, rule 3, under this article, provides that, if either of two approaching vessels fails to understand the course or inten-

[12] Galatea, 92 U. S. 439, 23 L. Ed. 727; Jamestown (D. C.) 114 Fed. 593; Lake Shore (D. C.) 201 Fed. 449; Diana, [1894] A. C. 625.

[13] James Bowen, 10 Ben. 430, Fed. Cas. No. 7,192; Ogdensburgh, 5 McLean, 622, Fed. Cas. No. 17,158.

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tion of the other, he shall signify it by giving several short and rapid blasts, not less than four, of his steam whistle.[14]

These are called the "danger signals," and are usually the last despairing wail before the crash. No such provision is contained in the International Rules, though it is a well-established practice among mariners. Lake Rule 26 prescribes substantially the same rules as to signaling as the above.

Rule 5 of the Inland Rules, in the same article, requires steamers, before rounding bends in a river or channel where the view is cut off, to blow one long whistle as a warning, and requires the same signal from vessels leaving a dock. In crowded harbors, or much frequented channels of navigation, this is an important precaution, and many cases have arisen under it.[15]

Rule 8 regulates overtaking vessels. It corresponds to International Rule 24, and will be discussed in that connection.

Rule 9 of the same article provides that the passing signals must only be used by vessels in sight of each other, and able to ascertain each other's course or position. When this is impossible from fog or other cause, then fog signals are used. International Rule 28 also provides that these signals are only to be used by vessels in sight of each other. But Lake Rule 23 requires them to be given "in all weathers," which makes it strikingly different from the other rules.

The language of International article 18 and of the corresponding article, rule 1 of the Inland Rules is quite different.

[14] Mahar & Burns (D. C.) 106 Fed. 86; Virginian, 238 Fed. 156, 151 C. C. A. 232.

[15] Pekin, [1897] A. C. 532; Gamma (D. C.) 103 Fed. 703; Chicago (D. C.) 101 Fed. 143; Mourne, [1901] P. 68. Winnie, 161 Fed. 101, 88 C. C. A. 265; Bouker No. 2, 254 Fed. 579, 166 C. C. A. 137; M. Moran, 254 Fed. 766, 166 C. C. A. 212.

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The International Rule requires that each steamer "shall alter her course to starboard," while the Inland Rule only requires each one to "pass on the port side of the other."

Article 28 of the International Rules requires one blast of the whistle when she is "directing her course to starboard"; that is, when she ports.

On the other hand, article 18, rule 1, of the Inland Rules, requires one blast as an indication of the intent of each vessel to "pass on the port side of the other," which may, but does not necessarily, involve porting the helm. Hence the whistles do not mean the same thing in the two sets of rules.[16]

SAME—THE CROSSING RULE

130. Of two crossing steamers, the one having the other on her own starboard side must keep out of the way.

Article 19 covers the case when two steamers are crossing so as to involve risk of collision. In such case the vessel which has the other on her starboard side must keep out of the way.

Vessels are crossing when they show opposite sides to each other, and are so nearly even that one cannot be considered an overtaking vessel. Thus:

A keeps out of the way.

This is a modification of the port-helm rule, as the vessels ordinarily pass to the right of each other. The cases under this rule have been numerous.[17]

[16] Lisbonense, 53 Fed. 293, 3 C. C. A. 539.

§ 130. [17] Cayuga, 14 Wall. 275, 20 L. Ed. 828; E. A. Packer, 140 U. S. 360, 11 Sup. Ct. 794, 35 L. Ed. 453; BREAKWATER, 155 U. S.

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The difficulty in applying this rule has usually arisen in drawing the line between a crossing vessel and an overtaking vessel. In the above-cited case of the Cayuga, the Supreme Court made it a crossing case where one vessel was abaft the beam of the other. This would hardly seem to be correct. The line between an overtaking vessel and a crossing vessel is the range of the side lights; that is, any vessel two points or less abaft the beam is a crossing vessel, any vessel more than two points abaft the beam is an overtaking vessel.[18]

This is adopted as the test in article 24, and therefore the decision in the Cayuga Case is not law now, if it ever was.

In a winding river it is frequently difficult to say whether two ships are crossing or not. In such case the question is determined, not by the accidental bearing, but by the general channel course.[19]

Any regulation made by the inspectors contrary to this rule is invalid.[20]

STEAM AND SAIL

131. A steamer must keep out of the way of a sail vessel. In doing so she must allow the sail vessel a wide berth.

Article 20 regulates their relations, and provides that, when a steam vessel and a sail vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

252, 15 Sup. Ct. 99, 39 L. Ed. 139; Senator Rice, 223 Fed. 524, 139 C. C. A. 72; Albano, [1907] A. C. 193; Fancy, [1917] P. 13.

[18] Aurania (D. C.) 29 Fed. 99.

[19] Velocity, L. R. 3 P. C. 44; Pekin, [1897] A. C. 532; L. C. Waldo, 100 Fed. 502, 40 C. C. A. 517.

[20] Pawnee (D. C.) 168 Fed. 371; James A. Walsh (D. C.) 194 Fed. 549.

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This rule is based upon the greater handiness of steamers, which are independent of wind and tide, and can move backwards, if necessary. It often looks like a hard rule, as the smallest oyster pungy can block the narrow channel available to an ocean steamer. As it is based upon the greater mobility of the steamer, the courts have not always enforced it rigidly when such mobility did not exist. For instance, a tug and tow, though, in the eye of the law, one vessel, and that a steamer, are often less manageable than a sail vessel. The tug cannot back, and, if her tow is large or unwieldy, cannot turn around except slowly. She is less manageable in fact than a sail vessel with a free wind, and hence the courts have more than once held the sail vessel in exceptional circumstances is required to do something.[21]

The question would turn on the degree of her embarrassment, with the presumptions against the tug, for exceptions to the rules must be introduced with great caution.[22]

A steamer may take her own method of passing a sail vessel. The mere approach of the two vessels does not bring about risk of collision. The steamer may assume that the sail vessel will do her duty, and do nothing to embarrass her. Hence the steamer may shape her course so as to avoid the sail vessel, and then go along at her ordinary speed under the assumption that the sail vessel will not interfere with her. If the steamer's course is such that it does not converge, she can go along without making any change.[23]

§ 131. [21] Marion W. Page (D. C.) 36 Fed. 329; Minnie C. Taylor (D. C.) 52 Fed. 323; Rose Culkin (D. C.) 52 Fed. 328.

[22] Marguerite (D. C.) 87 Fed. 953; Mary A. Bird (D. C.) 102 Fed. 648; Julia A. Trubee (D. C.) 136 Fed. 486; Id., 144 Fed. 1021, 74 C. C. A. 680; Warrior, L. R. 3 A. & E. 553; American, L. R. 6 P. C. 127.

[23] Scotia, 14 Wall. 181, 182, 20 L. Ed. 822; Free State, 91 U. S. 200, 23 L. Ed. 299; Illinois, 103 U. S. 298, 26 L. Ed. 562; Donnell v. Boston Towboat Co., 89 Fed. 757, 32 C. C. A. 331.

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This rule that vessels may each assume that the other will obey the law is one of the most important in the law of collision. Were it otherwise, and were vessels required to take all sorts of measures to keep out of the way when they are not in each other's way, navigation would be impossible. It is like the land negligence rule that an engineer need not stop his train on seeing some one on the track, but may assume that he will have intelligence enough to get off. Rules more rigid would break up traffic by land or sea.

There is, however, one important qualification which must be borne in mind. It is that a steamer must not approach so near a sailing vessel, and on such a course, as to alarm a man of ordinary skill and prudence. If the man on the sailing vessel makes an improper maneuver, he is not responsible. It is what is called an "error in extremis." It is difficult to lay down any rule defining how close a steamer may run to a sail vessel without infringing this rule, as it depends on the width of the channel and many other special circumstances. It depends largely on the course she is steering. If that course is parallel, and so far off that she is showing only one side light to the schooner, then she is all right; for any mariner of average intelligence knows that in such case the vessels will not strike if each keeps his course, and therefore has no right to lose his head. The leading case on the subject is the LUCILLE.[24] In that case a steamer and schooner were approaching on converging courses only half a point apart, so that they would have come within thirty yards of each other, and that in Chesapeake Bay. The court held that this was too close, and condemned the steamer. The report does not tell how the lights showed, but, if their courses were only half a point apart, this would make each see both side lights of the other, and indicate that they were coming end on.[25]

[24] 15 Wall. 679, 21 L. Ed. 247.

[25] Fannie, 11 Wall. 238, 20 L. Ed. 114.

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Another interesting case on this subject is the Chatham.[26] There a schooner going down the Elizabeth river saw an ocean steamer approaching, which showed only her red light (indicating a parallel course) until 50 or 75 yards off, when she showed both, indicating a course straight for the schooner. This alarmed the men on the schooner, and they starboarded, and thereupon the vessels struck. The court held that the steamer, having plenty of room, was in fault for running so close, and that the act of the schooner, if wrong, was an error in extremis.[27]

The test laid down in this case is that the proximity of the steamer, and her course and speed, must be such that a mariner of ordinary firmness and competent knowledge and skill would deem it necessary to alter his course to make the vessels pass in safety.

If, therefore, the steamer, though running close, shows by her lights that her course is not converging, she is within the law, and the other vessel must assume that she will stay within the law and navigate accordingly.[28]

PRIVILEGED VESSELS

132. A vessel having the right of way must keep her course and speed, and the other vessel may assume that she will do so.

By article 21, when by any of these rules one of two vessels is to keep out of the way, the other must keep her course and speed. This renders it obligatory on the vessel which has the right of way to pursue her course at the speed which she had been keeping up previously. She must

[26] 52 Fed. 396, 3 C. C. A. 161.

[27] See, as further illustrations, E. Luckenbach, 93 Fed. 841, 35 C. C. A. 628; Paoli, 92 Fed. 944, 35 C. C. A. 97; Delmar (D. C.) 125 Fed. 130; Bonnah v. Lakeside S. S. Co., 221 Fed. 40, 136 C. C. A. 566.

[28] Gate City (D. C.) 90 Fed. 314. See, also, Merchants' & Miners' Transp. Co. v. Hopkins, 108 Fed. 890, 48 C. C. A. 128.

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rely on the other vessel to avoid the collision, and not embarrass her by any maneuver. All she need do is to do nothing. Then the other vessel knows what to expect, and navigates accordingly.

This rule applies to all the other steering and sailing rules. Under it, when the sail vessel running free keeps out of the way, the closehauled vessel keeps her course. Between two crossing steamers, when the one on the left keeps out of the way, the other keeps her course. Between a steamer and a sail vessel, when the steamer keeps out of the way, the sail vessel keeps its course.

The principle is the same in all these different contingencies. It may be illustrated by one or two decisions.

In the BRITANNIA,[29] which was a collision in New York harbor, the steamer Beaconsfield had the right of way over the Britannia, under the crossing rule. The Britannia failed to keep out of the way, and thereupon the Beaconsfield stopped and reversed. The Supreme Court held that she should have kept her course, and was in fault for stopping and reversing.[30]

In the BREAKWATER,[31] which also was a crossing case, the privileged vessel did keep on, and the court held that she did right.

In collisions between steam and sail vessels the steamer's defense is usually that the sail vessel changed her course.[32]

Beating out a tack and then coming about where neces-

§ 132. [29] 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660. See, also, Northfield, 154 U. S. 629, 14 Sup. Ct. 1184, 24 L. Ed. 680; Texas, 198 Fed. 482, 117 C. C. A. 566; Howard v. The City of New York, 211 Fed. 882, 128 C. C. A. 260; Yang-Tsze Ins. Ass'n v. Furness, Withy & Co., 215 Fed. 859, 132 C. C. A. 201.

[30] New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; Mexico, 84 Fed. 504, 28 C. C. A. 472.

[31] 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139.

[32] Adriatic, 107 U. S. 512, 2 Sup. Ct. 355, 27 L. Ed. 497; Marguerite (D. C.) 87 Fed. 953; Gate City (D. C.) 90 Fed. 314.

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sary is not a change of course.[33] Nor are slight fluctuations in the general course of the sailing vessel.[34]

A vessel which has the right of way under any of these rules is usually designated the "privileged vessel." But keeping the course is an obligation as well as a privilege; and such vessel cannot change her course on a mere apprehension of danger.[35]

The corresponding Mississippi Valley Rule is rule 23 (Rev. St. § 4233), which says that the privileged vessel must keep her course, and says nothing as to speed. It is likely, however, that the courts will hold it to mean substantially what the others mean. In fact, under the strong intimation of the Supreme Court in the BRITANNIA, supra, it certainly means that she must keep some speed, even if it does not mean that she must keep her previous speed.[36]

CROSSING AHEAD

133. The burdened vessel must avoid crossing ahead of the other, if practicable.

Rule 22 requires every vessel which is directed to keep out of the way to avoid crossing ahead, if circumstances admit. This was long a practice of seamen, "Never cross the bow when you can go astern," but was for the first time made a rule in the rules of 1890. The Inland Rules have the same provision, but not the Lake Rules or Mississippi Valley Rules.[37]

[33] Empire State, 1 Ben. 57, Fed. Cas. No. 17,586; Coe F. Young, 49 Fed. 167, 1 C. C. A. 219.

[34] Emily B. Maxwell, 96 Fed. 999, 37 C. C. A. 658; Columbian, 100 Fed. 991, 41 C. C. A. 150.

[35] General U. S. Grant, 6 Ben. 465, Fed. Cas. No. 5,320; Europa (D. C.) 116 Fed. 696.

[36] Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

[37] As illustrations of this rule, see Zouave, 98 Fed. 747, 39 C. C. A. 258; Excelsior (D. C.) 102 Fed. 652; Robert Graham Dun, 107 Fed.

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THE STOP AND BACK RULE

134. The burdened steamer must slacken, stop, or reverse, if necessary, to avoid collision.

Article 23 provides that every steam vessel which is directed by those rules to keep out of the way of another vessel, shall, on approaching her, if necessary, slacken her speed, or stop or reverse.

This rule is radically changed from its old form. Until the revision of 1890, it required every steam vessel, when approaching another vessel so as to involve risk of collision, whether the other had the right of way or not, to resort to these maneuvers. The courts, however, had settled that this was not necessary as long as the vessels were moving on such courses that, if each one did his duty, as could be assumed by each, no collision would happen. These authorities have been cited in another connection. The present rules require this maneuver only of the burdened vessel, and require the privileged vessel not only to keep her course, but her speed as well.

The Mississippi Valley Rules still have the rule in its old form, applying to all steamers, and not simply those required to keep out of the way. This great change in the rule renders it necessary to be circumspect in citing cases arising before the change, as many vessels might have been obliged to stop and back then which would not be required to do so now. A privileged vessel, which stops and backs now, unless at the last moment as a desperate effort to avert certain collision, would commit a fault, instead of obeying the law.[38]

994, 47 C. C. A. 120; Thomas B. Garland (D. C.) 110 Fed. 687; Ashton, [1905] P. 21.

§ 134. [38] Mary Powell, 92 Fed. 408, 34 C. C. A. 421.

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Under article 28 of the International Rules and Inland Rules, the signal of three short blasts is required to be given as a notification of this action. They mean, "My engines are at full speed astern." In the other rules three blasts do not necessarily mean this.[39]

The rule has not been carried so far as to require stopping or reversing on the mere approach of two steamers, unless there is a continuous converging of their courses and increasing possibility of collision. If they can clear without difficulty by the use of their helms, that is sufficient.[40]

But where the best chance of avoiding collision is to keep on, it will not be a fault to do so.[41]

And it is not required the moment danger arises. A mariner is not supposed to be a lightning calculator, and is allowed a brief space for reflection.[42]

The expression "if necessary" does not mean essential, but prudent or expedient, to the mind of a mariner of skill.[43]

The effect of the screw on the direction of a ship's movement should be thoroughly understood.

The screws of most ships are right-handed; that is, they turn when going forward in the direction of the hands of a clock. The effect of this is a tendency to pull the ship's stern to the right, which swings her bow to the left. Hence, independent of wind, tide, or rudder, a propeller ship moving forward would gradually describe a circle to the left.

When a vessel backs, her screw turns in the contrary direction, and that tends to pull her stern to the left and to throw her bow to the right. Hence reversing, if there is

[39] As to the application of this rule, see Oporto, [1897] P. 249; Victory, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519; New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; Mourne, [1901] P. 68.

[40] Ante, p. 269; Jesmond, L. R. 4 P. C. 1; Rhondda, 8 A. C. 549.

[41] Benares, 9 P. D. 16; Mourne, [1901] P. 68.

[42] Emmy Haase, 9 P. D. 81; Ngapoota, [1897] A. C. 391.

[43] Ceto, 14 A. C. 670, 689.

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not sufficient space to kill her headway, may throw her towards the ship which she is trying to avoid.[44]

OVERTAKING VESSELS

135. The overtaking steamer must keep out of the way.

Article 24 provides that, notwithstanding anything contained in these rules, any vessel overtaking any other vessel shall keep out of the way of the overtaken vessel.

Under the crossing rule, the test between an overtaking and a crossing vessel has been shown. This rule adopts that test, and makes any vessel more than two points abaft the beam an overtaking vessel, and solves all cases of doubt by treating them as overtaking vessels.

The only signals prescribed by the International Rules for this case are the general ones contained in article 28, one blast meaning that the vessel is directing her course to starboard, and two that she is directing her course to port. But the Inland Rules in article 18, rule 8, prescribe special rules for the case. They require the last vessel to blow one blast if she wishes to pass to the right, and the forward one to answer it; two if she wishes to pass to the left, and the forward one to answer it. If the pilot of the front steamer thinks that they cannot safely pass, he answers the signal of the other steamer by several short blasts, whereupon the second steamer must wait until the forward steamer gives the assenting signal; and the forward steamer must not crowd upon the overtaking one. The Lake Rules and Mississippi Valley Rules have substantially the same provisions on the subject. The overtaking vessel must pass at a sufficient distance to avoid dan-

[44] For a fuller explanation of this, see Marsden on Collision, 413–416; Aurania (D. C.) 29 Fed. 98, 121; Normandie (D. C.) 43 Fed. 151, 159.

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ger of suction. She is in fault if collision is caused by her running too close.[45]

While the overtaken steamer must keep her general course, and the second steamer may so assume, yet if the first has exchanged signals with another boat which she is meeting, and is changing her course to conform thereto, the steamer overtaking her must take note of this change, and regulate her navigation accordingly.[46]

The overtaking steamer may assume that the first steamer will navigate according to the rule.[47]

The overtaking steamer, as she is passing, must not try to cut across in front too quickly. If she does, and renders collision inevitable, the other should back; not by virtue of the stop and back rule, as that does not apply to her, being the privileged vessel, but by virtue of the general prudential rule,[48] or the precaution rule.[49]

On the other hand, the overtaken vessel must keep her course and speed, and must not crowd on the overtaking vessel or hamper her movements.[50]

If she willfully obstructs the overtaking vessel, she will be held solely in fault, though there may have been some carelessness on the part of the overtaking vessel.[51]

§ 135. [45] City of Brockton (C. C.) 42 Fed. 928; Ohio, 91 Fed. 547, 33 C. C. A. 667; Queen City (D. C.) 189 Fed. 653; Cambria S. S. Co. v. Pittsburgh S. S. Co., 212 Fed. 674, 129 C. C. A. 210, 51 L. R. A. (N. S.) 966.

[46] Whitenash (D. C.) 64 Fed. 893.

[47] Long Island R. Co. v. Killien, 67 Fed. 365, 14 C. C. A. 418.

[48] Int. art. 27.

[49] Int. art. 29; Willkommen (D. C.) 103 Fed. 699.

[50] J. G. Gilchrist, 183 Fed. 105, 105 C. C. A. 397; Spencer v. Dalles P. & A. Navigation Co., 188 Fed. 865, 110 C. C. A. 499; James L. Morgan, 225 Fed. 34, 140 C. C. A. 360.

[51] Gaffner v. Pigott, 116 Fed. 486, 54 C. C. A. 641.

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CHAPTER XIII

RULES AS TO NARROW CHANNELS, SPECIAL CIRCUMSTANCES, AND GENERAL PRECAUTIONS

136. The Narrow Channel Rule.
137. The General Prudential Rule, or Special Circumstance Rule.
138. Sound Signals.
139. The General Precaution Rule.
140. Lookouts.
141. Anchored Vessels.
142. Wrecks.
143. The Stand-by Act.

THE NARROW CHANNEL RULE

136. In narrow channels each steamer must keep to the right-hand side.

Article 25 provides that in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

This is really a branch of the port-helm rule. The latter rule applies when the vessels are meeting end on, no matter whether they are in a harbor or a narrow channel, no matter whether they are following a channel or crossing it. The starboard-hand rule emphasizes this duty as to narrow channels. It means that each must keep along its own right-hand side, no matter how the relative bearings may be from sinuosities or other causes.[1]

This rule was added to the inland rules by the act of June 7, 1897, though it had been in the International Rules

§ 136. [1] VICTORY, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519; Arrow, 214 Fed. 743, 131 C. C. A. 49; Hokendaqua, 251 Fed. 562, 163 C. C. A. 556.

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since the revision of 1885. The courts, however, are rigid in enforcing it.

The Spearman [2] arose on the Danube, under a local rule substantially similar. The descending vessel took the left bank, and was held in fault for a collision with an ascending vessel, though the absence of lights on the latter might have contributed to the accident.

The Pekin [3] was a collision case in the river Whang Poo, in China, at a point where there was a sharp bend. The Normandie, in descending, kept to the starboard side, and the Pekin was ascending. This threw the Pekin on the Normandie's starboard bow on account of the bend, and she therefore claimed that it was a crossing case, and that under rule 19 she had the right of way. The House of Lords, however, held that the course must be judged, not by the accidental bearing at a bend, but by the general channel course, and that the Pekin was to blame for cutting across to the Normandie's side.

Another interesting English case in which the rule was applied was the Oporto.[4]

In the Spiegel,[5] Judge Coxe applied the rule to a collision on the Erie Canal at night, placing the responsibility on a boat which was on the wrong side.

The rule applies in fogs as well as in clear weather.[6]

What Constitutes a Narrow Channel

This is not easy to define. In the leading case of the RHONDDA,[7] the House of Lords held that the Straits of Messina were included in the term, and in the Leverington [8]

[2] 10 A. C. 276.
[3] [1897] A. C. 532.
[4] [1897] P. 249.
[5] (D. C.) 84 Fed. 1002.
[6] Yarmouth (D. C.) 100 Fed. 667; Newport News, 105 Fed. 389, 44 C. C. A. 541.
[7] 8 A. C. 549.
[8] 11 P. D. 117. Other illustrations from the English decisions: Clydach, 5 Asp. M. C. 336 (Falmouth entrance); Whitlieburn, 9 Asp.

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it was held that the Cardiff Drain, where it joins the entrance channel to the Roath Basin, came within the designation.

In Occidental & O. S. S. Co. v. Smith,[9] it was held to include the entrance to San Francisco harbor. So with Providence river.[10]

As the only object of the rule is to avoid collision, the common sense of the matter would seem to be that, as it does not apply to all channels, but only to narrow channels, a channel is not narrow, in the sense of the term, unless vessels approaching each other in it are compelled to approach on such lines as would involve "risk of collision" in the sense of the navigation rules. If it is wide enough to permit two steamers to pass at a safe distance without the necessity of exchanging signals, the rule would not apply; and it would be idle to require two steamers to cross to the other side. But if it is so narrow by nature, or so narrowed by anchored vessels or other causes, as to bring approaching steamers on lines in dangerous proximity, and require interchange of signals, then the rule would apply.

It does not apply to harbor navigation. Steamers moving about promiscuously in harbors, often from one point to another on the same side, are not expected to cross backwards and forwards in the attempt to observe the rule.[11]

It will be observed that this rule is very cautiously word-

M. C. 154 (Scheldt at Antwerp); Glengariff, [1905] P. 106 (Queenstown harbor entrance): Kaiser Wilhelm der Grosse, [1907] P. 259 (Cherbourg harbor entrance).

[9] 74 Fed. 261, 20 C. C. A. 419.

[10] Berkshire, 74 Fed. 906, 21 C. C. A. 169. Other illustrations from American decisions: Acilia (D. C.) 108 Fed. 975; Id., 120 Fed. 455, 56 C. C. A. 605 (Brewerton channel); Maling (D. C.) 110 Fed. 227, 237 (Cherry Island channel in the Delaware); Dauntless (D. C.) 121 Fed. 420; Id., 129 Fed. 715, 64 C. C. A. 243 (Mokelumne river); Vera (D. C.) 224 Fed. 998; Id., 226 Fed. 369, 141 C. C. A. 199 (President Roads).

[11] Islander, 152 Fed. 385, 81 C. C. A. 511; No. 4, 161 Fed. 847, 88 C. C. A. 665; Wrestler, 232 Fed. 448, 146 C. C. A. 442.

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ed. It only applies when it is "safe and practicable," and it only requires the "ship to keep to the right of the fairway or mid-channel." This means the water available for navigation at the time. For instance, if half of a narrow channel was obstructed by anchored vessels, the "fairway or mid-channel" would mean the part still unobstructed, and require the vessel to keep on her half of the channel still remaining, though that was not on the starboard side of the ordinary navigable channel. It would not be "safe and practicable" to do otherwise.[12]

Neither the Lake Rules nor the Mississippi Valley Rules contain this provision, but they have their own rules for narrow channels, the substance of which is that the boat with the current has the right of way. In the Lake Rules she must give the first signal, but in the Mississippi Valley Rules the ascending steamer does so.

But under the Mississippi Valley Rules the courts require each boat to keep to the right side as a matter of careful navigation.[13]

THE GENERAL PRUDENTIAL RULE, OR SPECIAL CIRCUMSTANCE RULE

137. The general prudential rule, or special circumstance rule, allows departure from the other rules, but only in extreme cases.

Article 27 provides that in obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may

[12] On the meaning of these words, see Smith v. Voss, 2 Hurl. & N. 97; RHONDDA, 8 A. C. 549; Clydach, 5 Asp. 336; Leverington, 11 P. D. 117; Oliver (D. C.) 22 Fed. 849; Blue Bell, [1895] P. 242; Glengariff, [1905] P. 106; Clutha Boat 147, [1909] P. 36; Turquoise, [1908] P. 148.

[13] Jakobsen v. Springer, 87 Fed. 948, 31 C. C. A. 315; Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751.

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render a departure from the above necessary in order to avoid immediate danger.

In the multitude of possible situations in which vessels may find themselves in relation to each other, there are necessarily occasional cases in which obstinate adherence to the rule would cause collision, when disregard of it might prevent it. This rule is made for such cases. These exceptional circumstances usually arise at the last moment, so that this rule has well been designated the rule of "sauve qui peut." It cannot be used to justify violations of the other rules, or to operate as a repeal of them. The certainty resulting from the enforcement of established rules is too important to be jeopardized by exceptional cases. Any rule of law, no matter how beneficial in its general operation, may work occasional hardship. Hence the courts lean in favor of applying the regular rules, and permit departure from them only in the plainest cases.

The principle which governs such cases existed and was applied long before it was enacted in the present rule. It is well expressed by Dr. Lushington in the John Buddle,[14] where he said: "All rules are framed for the benefit of ships navigating the seas, and, no doubt, circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule, however wisely framed. It is at the same time of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances which are alleged to have rendered such deviation necessary are most distinctly proved and established; otherwise vessels would always be in doubt and doing wrong."

In the Khedive,[15] two vessels were approaching each other green light to green light, when suddenly one ported, thereby establishing risk of collision. The captain of the

§ 137. [14] 5 Notes of Cases, 387.

[15] 5 A. C. 876. For a somewhat similar case, see the Kingston (D. C.) 173 Fed. 992.

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other starboarded, under the belief that this would bring the vessels parallel, and at least ease the blow. He did not reverse, as required by rule 23 as then worded. It was contended for him that he was justified under the special circumstances, but the House of Lords held that the stop and back rule governed, and that this rule could not be invoked to excuse noncompliance with the stop and back rule.

In the Benares,[16] a vessel saw a green light a little on her port bow. When they came close together, she saw the port side, but no red light where it should have been. She thereupon starboarded, and went full speed ahead, instead of backing and reversing. The court held that it was an exceptional case, governed by the general prudential rule, and that she had done right; and that a departure is justified when it is "the one chance still left of avoiding danger which otherwise was inevitable." [17]

The American courts have been equally reluctant to admit exceptions. In the Clara Davidson,[18] the court said: "But I do not find myself at liberty to ignore the inquiry whether a statutory rule of navigation was violated by the schooner. Those rules are the law of laws in cases of collision. They admit of no option or choice. No navigator is at liberty to set up his discretion against them. If these rules were subject to the caprice or election of masters and pilots, they would be not only useless, but worse than useless. These rules are imperative. They yield to necessity, indeed, but only to actual and obvious necessity. It is not stating the principle too strongly to say that nothing but imperious necessity, or some overpowering vis major, will excuse a sail vessel in changing her course when in the presence of a steamer in motion; that is, obeying the duty resting upon it or keeping out of the way. If the statutory rules of navigation were only optionally binding, we should

[16] 9 P. D. 16. See, also, Allan & Flora, 14 L. T. (N. S.) 860.
[17] See, also, Mourne, [1901] P. 68; Test, 5 Notes of Cases, 276.
[18] (D. C.) 24 Fed. 763.

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be launched upon an unbounded sea of inquiry in every collision case, without rudder or compass, and be at the mercy of all the fogs and mists that would be made to envelop the plainest case, not only from conflicting evidence as to the facts, but from the hopelessly conflicting speculations and hypotheses of witnesses and experts as to what ought to or might have been done before, during, and after the event. The statutory regulations that have been wisely and charitably devised for the governance of mariners furnish an admirable chart by which the courts may disentangle themselves from conflicting testimony and speculation, and arrive at just conclusions in collision cases."

In the BREAKWATER,[19] where, in a crossing case, the privileged vessel kept her course and speed, and was attacked because she did not reverse, the court said: "Where rules of this description are adopted for the guidance of seamen who are unlearned in the law, and unaccustomed to nice distinctions, exceptions should be admitted with great caution, and only when imperatively required by the special circumstances mentioned in rule 24, which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger. The moment the observance or nonobservance of a rule becomes a matter of doubt or discretion, there is manifest danger, for the judgment of one pilot may lead him to observe the rule, while that of the other may lead him to disregard it. The theory of the claimant that a vessel at rest has no right to start from her wharf in sight of an approaching vessel, and thereby impose upon the latter the obligation to avoid her, is manifestly untenable, and would impose a wholly unnecessary burden upon the navigation of a great port like that of New York. In the particular case, too, the signals exchanged between the steamers indicated clearly that the Breakwater accepted the situation and the obligation

[19] 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139.

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imposed upon her by the starboard-hand rule, and was bound to take prompt measures to discharge herself of such obligation."

In the Non Pareille,[20] the court said: "There is no such thing as a right of way to run into unnecessary collision. The rules of navigation are for the purpose of avoiding collision, not to justify either vessel incurring a collision unnecessarily. The supreme duty is to keep out of collision. The duties of each vessel are defined with reference to that object, and, in the presence of immediate danger, both, under rule 24, are bound to give way, and to depart from the usual rule, when adherence to that rule would inevitably bring on collision, which a departure from the rules would plainly avoid."

It is plain, therefore, that he who disregards the regular rules, and appeals to this one, shoulders a heavy burden. He is like the whist player who fails to return his partner's trump lead. He may be able to justify it, but explanations are in order.[21]

As vessels maneuvering around slips are not on regular courses, their navigation is usually governed by this rule.[22]

Collisions due to extinguishing the lights of vessels under governmental orders during war come under this rule.[23]

[20] (D. C.) 83 Fed. 524. See, also, Hercules, 51 Fed. 452; Mauch Chunk, 154 Fed. 182, 83 C. C. A. 276; John I. Clark (D. C.) 199 Fed. 981.

[21] Jakobsen v. Springer, 87 Fed. 948, 31 C. C. A. 315; Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751; Concordia, L. R. 1 A. & E. 93.

[22] Transfer No. 17, 254 Fed. 673, 166 C. C. A. 171; M. Moran, 254 Fed. 766, 166 C. C. A. 212.

[23] Algol, [1918] P. 7; Hydra, [1918] P. 78.

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SOUND SIGNALS

138. A steamer must indicate to other vessels in sight the course taken by her, by giving sound signals.

Article 28 prescribes these, but they have been explained in a previous connection, and need not be repeated.

THE GENERAL PRECAUTION RULE

139. Proper precautions, other than those required by the rules, are not to be neglected.

Article 29 provides that nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

This rule is intended as a supplement for the other rules, not as a substitute for them. It covers many cases not expressly included in the other rules.

SAME—LOOKOUTS

140. The law is rigid in requiring a competent lookout, charged with that sole duty.

A common instance is the necessity of a lookout. Both the English and American courts have said as emphatically as language can express it that vessels must have a competent lookout stationed where he can best see, and that he must be detailed to that sole duty. Neither the master nor helmsman, if engaged in their regular duties, can act as such, for they have troubles enough of their own. A good English illustration is the Glannibanta.[24]

§ 140. [24] 1 P. D. 283.

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In Clyde Nav. Co. v. Barclay,[25] the steamer, which was on her trial trip, was in charge of a pilot, but an officer also was on the bridge, and there was another man, not properly qualified, on the lookout. The House of Lords held this sufficient, and that the bridge was the proper place for the lookout under the circumstances.

The decisions of the American courts have been numerous and emphatic. In the MANHASSET,[26] the leading cases on the subject were reviewed, and the difference between the duties of the master and lookout clearly put. In that case a ferryboat crossing Norfolk harbor on a stormy night was condemned for having no one on duty except the master at the wheel.

In fact, circumstances may arise where more than one lookout is necessary. Large steamers have been held in fault for not having two, if it appears that objects were not seen as soon as possible.[27]

Under some circumstances—as where a vessel is backing, or another vessel is overtaking—there should be a lookout astern as well as forward.[28]

This rule as to lookouts must not be carried to a reductio ad absurdum. If the approaching vessels see each other an ample distance apart to take all proper steps, then the object of having a lookout is accomplished, and the absence of a man specially detailed and stationed is a fault not contributory, and therefore immaterial.[29]

[25] 1 A. C. 790.

[26] (D. C.) 34 Fed. 408. See, also, J. G. Gilchrist (D. C.) 173 Fed. 666; Id., 183 Fed. 105, 105 C. C. A. 397; Wilbert L. Smith (D. C.) 217 Fed. 981; Union S. S. Co. v. Latz, 223 Fed. 402, 138 C. C. A. 638.

[27] BELGENLAND, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943.

[28] Nevada, 106 U. S. 154, 1 Sup. Ct. 234, 27 L. Ed. 149; Sarmatian (C. C.) 2 Fed. 911; Bernicia (D. C.) 122 Fed. 886.

[29] Farragut, 10 Wall. 338, 19 L. Ed. 946; Blue Jacket, 144 U. S.

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The proper station for a lookout is where he can have an unobstructed view. It must be a place unobstructed by the sails, and is usually on the forecastle, or near the eyes of the ship.[30]

In the case of steamers, although courts discourage the practice of having the lookout in the pilot house, his proper location is a question of fact, not of law. The dissenting opinion of Chief Justice Taney in Haney v. Baltimore Steam-Packet Co.,[31] puts the doctrine as follows: "It has been argued that the lookout ought to have been in the bow, and some passages in the opinions of this court in former cases are relied on to support this objection. But the language used by the court may always be construed with reference to the facts in the particular case of which they are speaking, and the character and description of the vessel. What is the most suitable place for a lookout is obviously a question of fact, depending upon the construction and rig of the vessel, the navigation in which she is engaged, the climate and weather to which she is exposed, and the hazards she is likely to encounter; and must, like every other question of fact, be determined by the court upon the testimony of witnesses—that is, upon the testimony of nautical men of experience and judgment. It cannot, in the nature of things, be judicially known to the court as a matter of law."

The courts have ruled that this doctrine applies to all steamers, large and small, both as to the location of the lookout and the necessity of having a man independent of the master and wheelsman. In the case of tugs it is a rule

371, 12 Sup. Ct. 711, 36 L. Ed. 469; HERCULES, 80 Fed. 998, 26 C. C. A. 301; Elk, 102 Fed. 697, 42 C. C. A. 598; Columbia (D. C.) 104 Fed. 105; Fannie Hayden (D. C.) 137 Fed. 280.

[30] Java, 14 Blatchf. 524, Fed. Cas. No. 7,233; John Pridgeon, Jr. (D. C.) 38 Fed. 261; Bendo (D. C.) 44 Fed. 439, 444; Vedamore, 137 Fed. 844, 70 C. C. A. 342; Prinz Oskar, 219 Fed. 483, 135 C. C. A. 195.

[31] 23 How. 292, 16 L. Ed. 562.

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more honored in the breach than in the observance. There is some excuse for it, as the pilot house of the tug is so far forward and so elevated as usually to afford the best view. And, in addition, the stem of a tug being low down in the water, unlike the lofty stems of large vessels, is so wet a place in a heavy sea that a lookout could do no good. Hence the courts, though insisting on their rule even as to tugs, especially in harbor work, and requiring strong proof to satisfy them that the want of a special lookout did no harm, are more lenient in such cases than in cases of large steamers. The instances in the books where tugs have been condemned in this respect were cases where the accident was directly traceable to such neglect.[32]

SAME—ANCHORED VESSELS

141. When a moving vessel runs into a vessel anchored in a lawful place, with proper lights showing, or a bell ringing, if such lights or bell are required by rule, and with a proper anchor watch, the presumptions are all against the moving vessel, and she is presumed to be in fault, unless she exonerates herself.

The law in relation to collision with anchored vessels can best be classified under this twenty-ninth rule. The presumptions against the moving vessel in such a case are very strong. Practically her only defense is vis major, or inevitable accident, in the absence of fault on the part of the anchored vessel.[33]

[32] City of Philadelphia v. Gavagnin, 62 Fed. 617, 10 C. C. A. 552; George W. Childs (D. C.) 67 Fed. 271. As instances where tugs were held blameless on this score, see Caro (D. C.) 23 Fed. 734; Bendo (D. C.) 44 Fed. 439; R. R. Kirkland (D. C.) 48 Fed. 760; Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; HERCULES, 80 Fed. 998, 26 C. C. A. 301.

§ 141. [33] Le Lion (D. C.) 84 Fed. 1011; Minnie (D. C.) 87 Fed.

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If, however, there is any maneuver by which an anchored vessel, on seeing a collision imminent, can avoid or lighten it, she is required to do so. Sometimes the courts have held anchored vessels in such case required to sheer, or to let out additional chain, if they can do so.[84]

Anchoring in Channels

How far it is negligent in an anchored vessel to anchor in a channel of navigation is a question of fact depending upon special circumstances. In the neighborhood of many ports there are designated anchorage grounds, and a vessel anchored in these grounds designated by proper authority is not at fault on the mere score of anchorage. In other places vessels have grounds designated not by any special authority, but by general usage, and in that case, if the vessel anchors where it has been customary to anchor, and anchors in such a way that ample room is left for the passage of vessels, whether by day or night, allowing all necessary margin for the uncertainties of wind or current, it would not be negligent so to anchor. But, if a vessel anchors in a channel of navigation in such a way as to plant herself in the necessary path of passing vessels, so that moving vessels in such case come into collision with her, she is liable at least to be held partly in fault for the resulting collision; and, if it was a matter of nice calculation whether the moving vessel could pass or not, she would be held solely in fault.

In the Worthington,[85] a vessel anchored in the St. Clair river where it was customary to anchor, but left ample room for the passage of moving vessels. It was held that she was not to blame on the mere score of her anchorage, but that

780; Id., 100 Fed. 128, 40 C. C. A. 312; Europe (D. C.) 175 Fed. 596; Id., 190 Fed. 475, 111 C. C. A. 307.

[84] Sapphire, 11 Wall. 164, 20 L. Ed. 127; Clara, 102 U. S. 200, 26 L. Ed. 145; Oliver (D. C.) 22 Fed. 848; Clarita, 23 Wall. 1, 23 L. Ed. 146; Director (D. C.) 180 Fed. 606.

[85] (D. C.) 19 Fed. 836.

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the situation imposed upon her increased vigilance in reference to keeping an anchor watch and proper light.

The cases of the Oscar Townsend [36] and the Ogemaw [37] were also cases of vessels anchored in the St. Clair river, in which the anchored vessel was held blameless.

On the other hand, in the Passaic,[38] a vessel at anchor in the St. Clair river was held at fault, not so much for anchoring there as for anchoring herself in such a manner that she could not move or sheer either way, the other boat also being held in fault for running into her.

In the S. Shaw,[39] a vessel anchored in the Delaware within the range of the lights, which was forbidden by the local statute. She was held at fault.

So, in La Bourgogne,[40] a steamer was held in fault for anchoring in New York harbor, in a fog, outside the prescribed anchorage grounds.

In Ross v. Merchants' & Miners' Transp. Co.,[41] certain barges were anchored in such a way as to obstruct the channel, and there was strong evidence also that they did not have up proper lights. The court decided that they were to blame for adopting such an anchorage.

This doctrine of obstructing narrow channels has the merit of great antiquity. Article 26 of the Laws of Wisbuy provides: "If a ship riding at anchor in a harbor, is struck by another ship which runs against her, driven by the wind or current, and the ship so struck receives damage, either in her hull or cargo; the two ships shall jointly stand to the loss. But if the ship that struck against the other might have avoided it, if it was done by the master on purpose, or by his fault, he alone shall make satisfaction. The reason is, that some masters who have old crazy ships, may willingly lie in other ships' way, that they may be damnify'd or sunk, and so have more than they were worth for them. On

[36] (D. C.) 17 Fed. 93.
[37] (D. C.) 32 Fed. 919.
[38] (D. C.) 76 Fed. 460.
[39] (D. C.) 6 Fed. 93.
[40] 86 Fed. 475, 30 C. C. A. 203.
[41] 104 Fed. 302, 43 C. C. A. 538.

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which account this law provides, that the damage shall be divided, and paid equally by the two ships, to oblige both to take care, and keep clear of such accidents as much as they can."

These decisions were all rendered independent of statutory provision.

In the appropriation act of March 3, 1899, Congress made elaborate provisions for the protection of navigable channels, not only against throwing obstructions overboard, but against illegal anchorage. Sections 15 and 16 of that act [42] provided that it should not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft, and imposed a penalty not only upon the navigator who put them there, but upon the vessel itself.

It was not the intent of Congress by this act to forbid vessels absolutely from anchoring in navigable channels. If their draught of water is so great that they can only navigate in a channel, it is so great that they can anchor nowhere else. At the same time, any great draught and the necessities of the occasion could not be used as an excuse to blockade the channel.

The meaning of the act is that vessels are thereby forbidden from completely obstructing the channel, or so obstructing it as to render navigation difficult. The language of the act is, "prevent or obstruct." Hence, if a vessel anchors in a navigable channel, where other vessels had been accustomed to anchor, and anchors in such a way as to leave a sufficient passageway for vessels navigating that channel, she can hardly be held to violate this statute. If she was put there by local authority—as by a local pilot or harbor master—that would be evidence in her favor to show that she was not guilty of negligence; but even that would not excuse her for completely obstructing the channel, or so far obstructing it as to render navigation around her diffi-

[42] 30 Stat. 1152, 1153 (U. S. Comp. St. §§ 9920, 9921); post, p. 489.

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cult. Neither the vessel herself nor any local authority can be justified in blockading or rendering it unreasonably difficult.[43]

In the City of Reading,[44] a vessel was anchored outside the regular harbor grounds by a pilot—a fact unknown to her officers, as they were strangers in the port. District Judge McPherson held that the vessel was not negligent for such an anchorage under such circumstances. He does not allude to the act of Congress above referred to, although the accident happened on September 18, 1899, six months after the act went into effect.

SAME—WRECKS

142. The owner of a vessel sunk in collision is not liable for subsequent damages done by her if he abandons her, but is liable if he exercises any acts of ownership. In the latter case he is required to put a beacon on her at night, and a plain buoy in the day.

The reason why an owner who abandons a vessel is not liable for any further damage is that his misfortune is already great enough, and, if he feels that he cannot afford to save his vessel, the courts will not add to his responsibility. Under the federal statutes the government takes

[43] Itasca (D. C.) 117 Fed. 885; Northern Queen (D. C.) 117 Fed. 906; John H. Starin, 122 Fed. 236, 58 C. C. A. 600; Caldy (D. C.) 123 Fed. 802; Id., 153 Fed. 837, 83 C. C. A. 19; Newburgh, 130 Fed. 321, 64 C. C. A. 567; City of Birmingham, 138 Fed. 555, 71 C. C. A. 115; Job H. Jackson (D. C.) 144 Fed. 896; Ann J. Trainer, 152 Fed. 1021, 82 C. C. A. 332; Europe, 190 Fed. 475, 111 C. C. A. 307; Strathleven, 213 Fed. 975, 130 C. C. A. 381.

[44] (D. C.) 103 Fed. 696, affirmed City of Dundee, 108 Fed. 679, 47 C. C. A. 581, on another point. As to the effect of local usages or the acts of local officials, see, also, Severn (D. C.) 113 Fed. 578; Charles E. Matthews (D. C.) 132 Fed. 143; Juniata (D. C.) 124 Fed. 861; Merritt & Chapman Derrick & Wrecking Co. v. Cornell Steamboat Co., 185 Fed. 261, 107 C. C. A. 367.

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charge of abandoned wrecks, and blows them up, or otherwise destroys them; or, if it does not care to do so, sells the wreck after a certain advertisement, and requires the purchaser to remove them as obstructions from the channel.[45]

The law on this subject of the duty of owners of sunken wrecks may be seen from the cases of the Utopia,[46] U. S. v. Hall,[47] and Ball v. Berwind.[48]

If the owner, instead of abandoning his wreck, decides to raise her, he is then responsible for any injury done by her from the failure to take proper precaution.

In fact, this is one case where there may be a liability even for the acts of an independent contractor. As a general rule, when an independent contractor is employed to undertake work which an employer can lawfully let out to contract, he alone, and not the owner, is responsible;[49] but, where the act required is a personal duty, then the owner may be responsible, even for the acts of an independent contractor. To obstruct a navigable channel without giving proper notice is an act unlawful in itself, just as the obstruction of a highway or street would be under similar circumstances; and therefore, when the owner of a vessel is having her raised by an independent contractor, and the contractor omits to put proper lights or buoys upon the wreck, the owner also is liable; and he is liable for any lack of due diligence in raising the wreck.[50]

§ 142. [45] Act March 3, 1899, §§ 19, 20, 30 Stat. 1154 (U. S. Comp. St. §§ 9924, 9925).

[46] [1893] A. C. 492.

[47] 63 Fed. 473, 11 C. C. A. 294.

[48] (D. C.) 29 Fed. 541.

[49] Ante, pp. 211, 213.

[50] Snark, [1899] P. 74; Id., [1900] P. 105; Drill Boat No. 4 (D. C.) 233 Fed. 589; Compare Weinman v. De Palma, 232 U. S. 571, 34 Sup. Ct. 370, 58 L. Ed. 733. But the owner, after having secured the services of the Lighthouse Department, is not liable for

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THE STAND-BY ACT

143. This act requires colliding steamers to stay by each other regardless of the question of fault, on pain of being presumed negligent if they disregard this duty.

The act of September 4, 1890, provides as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default.

"Sec. 2. That every master or person in charge of a United States vessel who fails, without reasonable cause, to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of one thousand dollars, or imprisonment

its acts or omissions. Plymouth, 225 Fed. 483, 140 C. C. A. 1; McCaulley v. Philadelphia, 119 Fed. 580, 56 C. C. A. 100.

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for a term not exceeding two years; and for the above sum the vessel shall be liable and may be seized and proceeded against by process in any District Court of the United States by any person; one-half such sum to be payable to the informer and the other half to the United States." [51]

This is a copy of the earlier English act on the same subject, and is intended to prevent a ship, even if faultless herself, from leaving the other to her fate, and also to give the information necessary as the basis of any proceeding for damages.

Presumptions against Violator of Act

The act merely raises a presumption in the absence of evidence to the contrary. Hence, if the case is tried on plenary proofs, the act does not do more than shift a nicely-balanced burden of proof. The master may be punished for his inhumanity under the second section, but his innocent owners cannot be mulcted in damages on that account if their vessel was guiltless of contributing to the collision. As Dr. Lushington says in the Queen of the Orwell: [52] "Now for the penalty, or what may be called the penalty: 'In case he fails so to do, and no reasonable excuse for said failure,' it shall be attended with certain consequences which are enumerated in the enactment. The effect of that, I think, is precisely what has been stated—that, supposing such a state of things to occur, there is thrown upon the party not rendering assistance the burden of proof that the collision was not occasioned by his wrongful act, neglect, or default. It does not go further. Assuming this case to come within the provisions of the statute, the proper question I shall have to put to you is that which I should put if no such statute at all existed: whether this collision was occasioned by the wrongful act, neglect, or default of the steamer."

§ 143. [51] 26 Stat. 425 (U. S. Comp. St. §§ 7979, 7980).
[52] 1 Mar. Law Cas. (O. S.) 300.

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A leading American case on the subject is the HERCULES.[53]

[53] 80 Fed. 998, 26 C. C. A. 301. See, also, Trader (D. C.) 129 Fed. 462; Luzerne (D. C.) 148 Fed. 133; Id., 157 Fed. 391, 85 C. C. A. 328; Lizzie Crawford (D. C.) 170 Fed. 837. Pitgaveney, [1910] P. 215. In England this presumption of negligence has been repealed by the Maritime Conventions Act 1911, § 4 (2).

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CHAPTER XIV

OF DAMAGES IN COLLISION CASES

144. Recovery Based on Negligence.
145. Inevitable Accident or Inscrutable Fault.
146. One Solely in Fault.
147. Both in Fault.
148. Rights of Third Party where Both in Fault.
149. Contribution between Colliding Vessels—Enforcement in Suit against Both.
150. Enforcement by Bringing in Vessel not Party to Suit.
151. Enforcement by Independent Suit.
152. Measure of Damages.
153. When Loss Total.
154. When Loss Partial.
155. Remoteness of Damages—Subsequent Storm.
156. Doctrine of Error in Extremis.

RECOVERY BASED ON NEGLIGENCE

144. Negligence is an essential to recovery of damages in collision cases.

The mere happening of a collision does not give rise to a right of action for damages resulting therefrom, except in those cases where, under the navigation rules, one vessel is presumed to be in fault until she exonerates herself. Even in those cases the right of recovery is based, not upon the fact of collision, but upon the presumption of negligence.

A collision may happen under any one of several circumstances. It may arise without fault, it may arise by the fault of either one of the two, or it may arise by the fault of both. The law, as administered in the admiralty courts, is summarized by Lord Stowell in the WOODROP-SIMS.[1] In it he says:

§ 144. [1] 2 Dod. 83.

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"In the first place, it [collision] may happen without blame being imputable to either party; as, where the loss is occasioned by a storm, or other vis major. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame—where there has been want of due diligence or of skill on both sides. In such a case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case the innocent party would be entitled to an entire compensation from the other."

The question must be considered—First, as between the two ships; and, second, as respects third parties.

As between the owners of the two ships, it must be considered—First, where neither is in fault; second, where one alone is in fault: third, where both are in fault.

INEVITABLE ACCIDENT OR INSCRUTABLE FAULT

145. Where neither vessel is in fault, or where the fault is inscrutable, neither can recover, and the loss rests where it falls.

Meaning of "Inevitable Accident"

A collision arising by inevitable accident comes under this clause.

An "inevitable accident," in the sense in which it is used in this connection, does not mean an accident unavoidable under any circumstances, but one which the party accused cannot prevent by the exercise of ordinary care, caution,

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and maritime skill. This definition is taken from the MARPESIA.[2]

In the GRACE GIRDLER,[3] the court says: "Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances; such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property. Where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen."

In the Mabey [4] the same idea is expressed thus: "Where the collision occurs exclusively from natural causes, and without any negligence or fault on the part of either party, the rule is that the loss must rest where it fell, as no one is responsible for an accident which was produced by causes over which human agency could exercise no control. Such a doctrine, however, can have no application to a case where negligence or fault is shown to have been committed on either side. Inevitable accident, as applied to a case of this description, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together."

The reason for this is that it is unfair to hold any one re-

§ 145. [2] L. R. 4 P. C. 212; Schwan, [1892] P. 419.

[3] 7 Wall. 196, 19 L. Ed. 113; Lackawanna, 210 Fed. 262, 127 C. C. A. 80.

[4] 14 Wall. 204, 20 L. Ed. 881; Coxe Bros. & Co. v. Cunard S. S. Co. (D. C.) 174 Fed. 166.

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sponsible for a disaster produced by causes over which human skill and prudence can exercise no control.[5]

Under this class may be ranged those cases where accidents happen from the breakdown of machinery or other appliances.

In the William Lindsay,[6] a vessel was tied to a regular mooring buoy in the harbor. During a storm the buoy broke loose, and in trying to put out an anchor the cable on the windlass became jammed. The court held that it was an inevitable accident.

In the Olympia,[7] a collision was caused by the breaking of a tiller rope from a latent defect, the proof showing that it had been carefully inspected. The court held that it was an inevitable accident.

On the other hand, in the M. M. Caleb,[8] where a rudder chain broke from a defect which was discoverable by the exercise of reasonable care, the court held that it was negligence, and not an inevitable accident.

Collisions may occur from an inevitable accident, though nothing breaks, and there is no vis major. In the Java[9] a small schooner, which came from behind a large schoolship, was struck by a steamer coming from the other side, and it appeared that the steamer could not have seen the

[5] Sunnyside, 91 U. S. 208–210, 23 L. Ed. 302.

[6] L. R. 5 P. C. 338; E. M. Peck, 228 Fed. 481, 143 C. C. A. 63; Hispania, 242 Fed. 265, 155 C. C. A. 105. But jamming or breaking of steering gear, caused by too sudden a change in order to avoid a danger that should have been anticipated sooner, is not an inevitable accident. Brigham v. Luckenbach (D. C.) 140 Fed. 322; Edmund Moran, 180 Fed. 700, 104 C. C. A. 552.

[7] 61 Fed. 120, 9 C. C. A. 393; Virgo, 3 Asp. 285.

[8] 10 Blatchf. 467, Fed. Cas. No. 9,683; Acme (D. C.) 123 Fed. 814; J. N. Gilbert, 222 Fed. 37, 137 C. C. A. 575; Warkworth, 9 P. D. 20, 145; Merchant Prince, [1892] P. 179.

[9] 14 Wall. 189, 20 L. Ed. 834; Columbus, Fed. Cas. No. 3,043; Luzerne (D. C.) 148 Fed. 133; Id., 157 Fed. 391, 85 C. C. A. 328; Merritt & Chapman Derrick & Wrecking Co. v. Cornell Steamboat Co. (D. C.) 174 Fed. 716; Id., 185 Fed. 261, 107 C. C. A. 367.

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sail vessel on account of the large ship. The court held that the accident was inevitable.

In the Transfer No. 3,[10] one boat was gradually overhauling another, and, when in a position where she could not stop in time to avoid collision, the machinery of the front boat broke down. The case was held one of inevitable accident.

The party defending on this ground has the burden of negativing any negligence on his part which might account for the accident.[11]

In cases of inscrutable fault, also, each party bears his own loss. Cases under this head are not common, as courts are loath to admit inability to locate fault.[12]

ONE SOLELY IN FAULT

146. Where one alone is in fault, that one alone is liable.

This is so obvious that further discussion seems unnecessary.

BOTH IN FAULT

147. Where both are in fault, the damages are equally divided, irrespective of the degree of fault.

This is the settled law in America, and until recently in England, and marks a sharp distinction between the common-law and admiralty courts. The distinction between the two forums is summarized in CAYZER v. CARRON Co.,[13] in which the court said:

[10] (D. C.) 91 Fed. 803.

[11] Edmund Moran, 180 Fed. 700, 104 C. C. A. 552; Bayonne, 213 Fed. 216, 129 C. C. A. 560; Merchant Prince, [1892] P. 179.

[12] Centurion, 100 Fed. 663, 40 C. C. A. 634; Jumna (D. C.) 140 Fed. 743; Id., 149 Fed. 171, 79 C. C. A. 119; Banner (D. C.) 225 Fed. 433.

§ 147. [13] 9 A. C. 873.

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"Now, upon that I think there is no difference between the rules of law and the rules of admiralty to this extent: That, where any one transgresses a navigation rule, whether it is a statutory rule, or whether it is a rule that is imposed by common sense—what may be called the common law—and thereby an accident happens, of which that transgression is the cause, he is to blame, and those who are injured by the accident, if they themselves are not parties causing the accident, may recover both in law and in admiralty. If the accident is a purely inevitable accident, not occasioned by the fault of either party, then common law and admiralty equally say that the loss shall lie where it falls—each party shall bear his own loss. Where the cause of the accident is the fault of one party, and one party only, admiralty and common law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both each party being guilty of blame which causes the accident, there is a difference between the rule of admiralty and the rule of common law. The rule of common law says, as each occasioned the accident, neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss, it shall be brought into hotchpotch, and divided between the two. Until the case of Hay v. Le Neve,[14] which has been referred to in the argument, there was a question in the admiralty court whether you were not to apportion it according to the degree in which they were to blame; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the admiralty is that, if there is blame causing the accident on both sides, they are to divide the loss equally, just as the rule of law that, if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls."

[14] 2 Shaw, 395.

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The doctrine was adopted in America in the CATHARINE,[15] and has been followed in numerous subsequent cases, in all of which the Supreme Court treats the law on the subject as settled.[16]

In arriving at the apportionment of damages when the injuries to the two vessels are unequal, the doctrine is not that the losses of each vessel are treated as separate causes of action asserted as cross causes, but that it is one cause of action only, and the vessel most injured is entitled to a decree for half the difference between her loss and the other.[17]

If the limited liability act protects the owners of one vessel from having to pay their moiety, the owners of the other vessel, if a third party has held them for more than their moiety, can recoup their loss, or plead it in set-off against the claim which the other vessel would otherwise have against them.[18]

In the Chattahoochee [19] the owner of the vessel lost libeled the other vessel for his own loss and as bailee of the cargo for its loss. Both vessels were held in fault. The vessel proceeded against was permitted to plead its liability to the shippers in reduction of its liability to the owner of the other vessel, though the shippers could not have held their own carrier in a direct proceeding on account of the Harter

[15] 17 How. 170, 15 L. Ed. 233.

[16] See, as illustrations, Maria Martin, 12 Wall. 31, 20 L. Ed. 251; NORTH STAR, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

[17] Sapphire, 18 Wall. 51, 21 L. Ed. 814; Manitoba, 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095; Burke, Fed. Cas. No. 2,159; Khedive, 7 App. Cas. 795, 808; London S. S. Ass'n v. Grampian S. S. Co., 24 Q. B. D. 32, 663. Damages for which one of the two vessels has been held liable to a third are brought into the estimate. Frankland, [1901] P. 161.

[18] NORTH STAR, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

[19] 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801; Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751; George W. Roby, 111 Fed. 601, 49 C. C. A. 481.

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Act. In other words, a balance was struck between the two sets of damage and a decree given for half the difference.

Origin of the Half-Damage Rule

In examining the history of this half-damage rule, it is remarkable that the courts have adopted as a case for division of damages simply the case of mutual fault. This was not the origin of the rule. It may be traced at least as far back as the Laws of Oleron, article 14 of which provides:

"If a Vessel being moar'd lying at Anchor, be struck or grappled with another vessel under sail that is not very well steer'd, whereby the vessel at anchor is prejudic'd, as also wines, or other merchandize, in each of the said ships damnify'd. In this case the whole damage shall be in common, and be equally divided and appriz'd half by half; and the Master and Mariners of the vessel that struck or grappled with the other, shall be bound to swear on the Holy Evangelists, that they did it not willingly or willfully. The reason why this judgment was first given, being, that an old decay'd vessel might not purposely be put in the way of a better, which will the rather be prevented when they know that the damage must be divided."

Under this provision the damages were divided not only as among the vessels, but the cargoes, and that, too, whether negligent or not, unless it was intentional.

Article 26 of the Laws of Wisbuy apportions the loss as between the two ships, but only in cases of accident, not in case of fault. On the other hand, title 7, §§ 10, 11, of the Ordonnance of Louis XIV, provides:

"X. In case of ships running aboard each other, the damage shall be equally sustained by those that have suffered and done it, whether during the course, in a road, or in a harbour.

"XI. But if the damage be occasioned by either of the masters, it shall be repaired by him."

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Thus it is clear that the application of the rule in modern times is much narrower than it was in its origin.

An examination of these old codes reveals another important fact in relation to it, and that is that it originated not in the law of torts, but in the law of average. It is under that head in the Ordonnance of Louis XIV, and the language of the others shows that it was treated as a contribution, and not as a liability on the ground of tort. The importance of this will appear in an early connection.

The doctrine of an equal division, no matter how the fault may compare, is so well settled by repeated decisions that it can hardly be considered open to question. There is one case in which the court refused to apply it. In the VICTORY,[20] which was a collision between two English ships in Norfolk harbor, the District Court decided the Victory alone at fault. An appeal was taken, and the case hotly contested in the Circuit Court of Appeals on the main question of fault, no question as to the apportionment of damage being raised either in the record or briefs. The Circuit Court of Appeals reversed the decision of the District Court on the facts, and held both at fault, but the fault of the Victory to be the more flagrant of the two; and it apportioned the loss by making the owners of the Victory pay the full value of their vessel, and the owners of the Plymothian merely pay the deficit sufficient to satisfy the cargo owners in full. A certiorari was applied for and obtained, and the case was argued in the Supreme Court, but that tribunal held the Victory alone at fault, and reversed the decision of the Circuit Court of Appeals, so that the judgment of the latter on that question can hardly be considered a precedent on the question of the proper method of apportioning the damage.

[20] (D. C.) 63 Fed. 631; Id., 68 Fed. 395, 15 C. C. A. 490; Id., 168 U. S. 419, 18 Sup. Ct. 149, 42 L. Ed. 519; C. R. Hoyt (D. C.) 136 Fed. 671.

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The reason given by Dr. Lushington for an equal division, even where the fault is unequal,[21] is the impossibility of apportioning accurately under such circumstances, and the uncertainty which it would introduce into litigation. No two judges might agree as to the exact proportions to be made, and it would be impossible for counsel in any collision case to advise with any degree of accuracy.

A modification of the old rule that contributory negligence defeats recovery has been recently attempted in some of the common-law courts by the introduction of the doctrine of comparative negligence, which is intended to allow a jury to apportion the damages according to the degree of fault. The uncertainties arising from it, and the increase of litigation attendant upon all uncertainty, have prevented its general adoption; and, even as to the jurisdictions that have adopted it, the opinion of a distinguished text-writer is that it has caused more confusion than benefit.[22]

This question has received a great deal of discussion in the past few years as an academic question among maritime writers, but, so far as the decisions are concerned, it is so well settled that only statutory enactment could change it.[23]

It must, however, be admitted that there is a tendency in modern legislation to extend this doctrine of comparative negligence, as is shown by the statutes regulating the rights of employés of carriers. An old English writer once remarked that the measure of equity rights by the chancellor's conscience was about as certain as if it had been by the length of his foot. Whether the fancied attainment of a nearer measure of justice is worth the uncertainty in the application of such a rule by judges or juries remains to be seen.

[21] Milan, Lush. 388.

[22] 2 Wood, R. R. (Ed. 1894) p. 1506, § 322b.

[23] Atlas, 93 U. S. 302, 23 L. Ed. 863; Jacobsen v. Dulles P. & A. Nav. Co. (D. C.) 106 Fed. 428; Id., 114 Fed. 705, 52 C. C. A. 407.

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In England the equal division rule in cases of unequal fault has been abolished by the Maritime Conventions Act, 1911, which apportions the loss according to the degree of fault.

Where more than two vessels are involved, the apportionment is made among all actually at fault.[24]

In America the costs are divided like the damages,[25] in England each side pays his own costs.[26]

RIGHTS OF THIRD PARTY WHERE BOTH IN FAULT

148. An innocent third party can recover against both vessels, but the form of his decree is not a general decree against both, but a decree for half against each with a remedy over against the other for any deficiency.

In England, in such cases, he can recover only half against each, and cannot make up his deficit against the other; and in case of a collision between two English ships on the high sea, an American court will apply the English rule.[27]

[24] Eugene F. Moran v. New York Cent. & H. R. R. Co., 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600; Maling (D. C.) 110 Fed. 227; S. A. McCaulley (D. C.) 116 Fed. 107 (reversed on facts in Pacific, 154 Fed. 943, 83 C. C. A. 515); Manhattan (D. C.) 181 Fed. 229 (reversed on facts 186 Fed. 329, 108 C. C. A. 407).

[25] America, 92 U. S. 432, 23 L. Ed. 724; Frank S. Hall (D. C.) 128 Fed. 816; Garden City (D. C.) 236 Fed. 302.

[26] Marpesia, L. R. 4 P. C. 212; City of Manchester, 5 P. D. 221; Rosalia, [1912] P. 109; Cardiff Hall, [1918] P. 56.

[27] Eagle Point, 142 Fed. 453, 73 C. C. A. 569; Ralli v. Societa Anonima Di Navigazione a Vapore G. L. Premuda (D. C.) 222 Fed. 994. For the English and American rules compared, and the effect of the Maritime Conventions Act, 1911, on the recovery, see Marsden on Collisions (7th Ed.) 148, 153.

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The form of this decree shows that the doctrine did not find its origin in the law of torts, although many judges speak of the two vessels as joint tort-feasors. The Supreme Court has sedulously guarded the form of this decree, even correcting it in some instances where the question was not a material one, as the values were sufficient. This form of decree was announced in the Washington,[28] which was a case of a passenger on a ferryboat injured by the joint negligence of his boat and another vessel.

In the Alabama,[29] a vessel in tow was injured by the joint negligence of her tug and another vessel. The court gave the decree in the form above stated.

But this is a rule intended to do justice as between the wrongdoers, and will not be so applied as to deprive an innocent party of his right of full recovery. Hence, in the ATLAS,[30] a shipper on one of two vessels, both of which were in fault, proceeded against one vessel alone, and it was held that he was entitled to do so, and to recover his full damage from that vessel. The question is thoroughly discussed in the opinion delivered by Mr. Justice Clifford, who seems to treat it as much on the basis of an average contribution as upon the basis of a tort; that average contribution, however, to be applied simply as between the two in fault.[31]

[28] 9 Wall. 513, 19 L. Ed. 787.
[29] 92 U. S. 695, 23 L. Ed. 763.
[30] 93 U. S. 302, 23 L. Ed. 863.
[31] See, also, Sterling, 106 U. S. 647, 1 Sup. Ct. 89, 27 L. Ed. 98; New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126.

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CONTRIBUTION BETWEEN COLLIDING VESSELS —ENFORCEMENT IN SUIT AGAINST BOTH

149. Where both are negligent, and have been brought before the court by a joint libel against both, this contribution will be enforced.

Under the cases cited in a previous discussion, the form of the decree by which the third party is simply given a decree for half, with a contingent remedy over, is itself an enforcement of the right of contribution. At common law, in cases where no contribution existed as between wrongdoers, the decree was in solido against each, and, if the plaintiff levied his execution, and made his money out of one, that one could not compel the other to pay his part. These different forms of judgment or decree show the difference in the origin of the two doctrines at common law and in admiralty.

SAME—ENFORCEMENT BY BRINGING IN VESSEL NOT PARTY TO SUIT

150. Under the fifty-ninth admiralty rule, where the third party has proceeded against only one, that one can, by petition, obtain process to bring in the other vessel, if within reach of process.

This fifty-ninth rule in admiralty was promulgated on March 26, 1883.[82] It was the outgrowth of the decisions in reference to the form of decree, and was intended to prevent the injustice of leaving to the caprice of the libelant which of two colliding vessels he should hold. Just prior

§ 150. [82] 112 U. S. 743, 29 Sup. Ct. xlvi, post, p. 530.

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to its promulgation the HUDSON [88] had been decided by District Judge Brown in the District Court for the Southern District of New York. In that decision Judge Brown sustained a motion to bring in as defendant one of the two vessels that was not before the court, and in doing so rendered an opinion as to the advantages of the procedure and the relative rights of the two colliding vessels in such cases. His learned discussion, both of the English and American authorities, treats the matter rather as a matter of contribution or average than a matter of joint tort. Hence, where vessels are in the jurisdiction, the fifty-ninth rule permits a proceeding against the vessel not sued, which practically makes an average adjustment, so to speak, of the loss among the parties liable. Hence the right of contribution is clear in two classes of cases: First, those in which both vessels are sued, and it can be brought about by the form of decree or by recoupment; and, second, those in which only one vessel is sued, and the other vessel is within reach of the court's process.

SAME—ENFORCEMENT BY INDEPENDENT SUIT

151. On the above principles, the right of contribution ought to exist between the two vessels by independent suit; and this right is settled by the later authorities.

The above discussion leaves open the case of suit against one vessel by the third party when the other vessel is not within the jurisdiction, and cannot be reached by process under the fifty-ninth rule. Suppose that in such a case the libelant gets a full decree against the vessel before the court, and compels payment, can that vessel institute an independent suit against the other vessel, and compel it to pay its portion?

[88] (D. C.) 15 Fed. 162.

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There are decisions to the effect that such a remedy does not lie.

In the Argus,[84] in the District Court for the Eastern District of Pennsylvania, a dredge in tow of a tug collided with a steamer. The tug was operating the dredge under a contract between the owners by which the movements of the tug were controlled entirely by the tow. The owners of the dredge proceeded in New York against the steamer and tug for damages, but the tug was not served with process. and the dredge owners recovered their full damages from the steamer. Thereupon the steamer paid the damages, and libeled the tug in the District Court of Pennsylvania to compel her to pay her share. The District Court held that there was no direct remedy by the steamer against the tug; that, if she had any right at all, it must be by way of substitution to the lien which the libelant had asserted; and that in that special case the libelant was debarred from proceeding against the tug, as the management of the tug was solely in charge of his own officers. The opinion assumes, without discussion, that in the case of joint tort-feasors there is no recovery.

In the Mariska,[85] in the District Court for the Northern District of Illinois, it was held that admiralty rule 59 was not intended to give a subsequent proceeding of this sort, and that, independent of that rule, it was a case of joint tort-feasors, as to which there was no contribution.

This was reversed on appeal, but the ground of the opinion in the appellate court was given rather as a right derivative by subrogation than as an independent right of action.

Both these cases assume that if, at common law, a loss is caused by negligence, it is a case of joint tort, as to which there is no contribution.

§ 151. [84] (D. C.) 71 Fed. 891.

[85] (D. C.) 100 Fed. 500, reversed 107 Fed. 989, 47 C. C. A. 115.

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Even at common law this assumption is erroneous. The rule that there is no contribution among joint tort-feasors, according to the better authority, in the common-law courts applies only in cases where there was some intentional or moral wrong committed. It presupposes an evil intent, and as to such cases it was certainly a wise rule. But the better authority is that this doctrine does not apply where the injury was unintentional, but arose merely from negligence, or the operation of some rule of law.[36]

The subject has been considered in England in Palmer v. Wick & P. Steam Shipping Co.[37] In it the question is discussed mainly with reference to the law of Scotland, but in some of the opinions the old English authorities in which the doctrine originated are reviewed and distinguished.

It is considered also by Judge Brown in the HUDSON, supra, who arrived at the same conclusion with reference to the common-law doctrine as that above announced. But the weight of English authority is against contribution.[38]

In Armstrong County v. Clarion County,[39] a traveler was injured by the defective condition of a bridge maintained jointly by two counties. He sued one county, and recovered. Thereupon this county sued the other, and the court sustained its right to contribution, holding that the common-law rule gave contribution where the act that was being done was not unlawful, and that contribution arises from natural principles, and not from contract.

In the Gulf Stream,[40] where certain shippers had sued both vessels in a collision, one of the vessels compromised

[36] Pol. Torts, 171; 12 Harvard Law Rev. 176 (1898); Law Quarterly Rev. (July, 1901) 293.

[37] [1894] A. C. 318.

[38] Frankland, [1901] P. 161, and cases cited.

[39] 66 Pa. 218, 5 Am. Rep. 368. On this subject of contribution at common law, see the note to the case of Kirkwood v. Miller, 5 Sneed. (Tenn.) 455, 73 Am. Dec. 147.

[40] (D. C.) 58 Fed. 604.

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a good many of the claims at a considerable discount, and attempted to set off their full value against the other vessel in a settlement between them. The court held that the parties occupied in the admiralty towards each other somewhat the relation of cosureties, and that the other vessel was entitled to the benefit of these compromises. And in the NORTH STAR,[41] previously cited, the opinion reviews the old admiralty codes on the subject, and shows that the doctrine of division of loss in admiralty cases arose out of the principles of general average, as has been heretofore discussed.

If these last three cases are right, it follows that an action for contribution ought to lie by one vessel against the other. The fact that there is no privity between them is immaterial; for general average and contribution do not depend upon questions of privity or contract, but upon principles of natural justice. Indeed, the fact that they were not intentionally concurring in the act complained of is the reason why there should be a contribution, and why the common-law rule does not apply. Hence the reasoning of the Pennsylvania judge[42] that the right could only be claimed derivatively through the libelant is counter to the original principles on which the doctrine was based. It arose from a desire of the admiralty courts to adjust equitably the relations between the two vessels themselves, and not through any consideration of the rights of a third party against them, for his rights are unaffected by the doctrine. And the other reason given in the two cases above cited, holding the adverse doctrine that there is no contribution against tort-feasors, is counter to the preponderance of authority, even at common law, which is to the effect that, where the act was not intentional, there may be a contribution between tort-feasors.

On principle such a suit should lie in the admiralty. If

[41] 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

[42] In the Argus (D. C.) 71 Fed. 891, supra, p. 322.

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the Supreme Court, by rule, can confer jurisdiction on an admiralty court to bring the other vessel in by petition, as is done by the fifty-ninth rule, that shows that the right is one of admiralty character, for a Supreme Court cannot, by rule, make a thing maritime which is not so by nature. It can only give a maritime remedy to a right maritime by nature. It has been seen in another connection that, where a salvor collects the entire salvage due, his cosalvors can sue him in admiralty to enforce an apportionment or contribution,[43] and this is a similar case. Admiralty has undoubted jurisdiction to compel contribution in cases of general average, and the doctrine now under discussion originated in the law of average.[44] Hence contribution may be enforced in an admiralty proceeding, probably in rem, and certainly in personam, as between the owners of two colliding ships where one had been compelled to pay more than his share. It is a necessary corollary from the doctrine that a decree is for half against each with a remedy over, thus making it a case where one is necessarily surety for the other in case of a deficit. The right has been definitely settled accordingly by two recent decisions of the Supreme Court.[45]

Both these cases were libels in personam, but no reason is perceived why the right could not be enforced by a pro-

[43] Ante, p. 151.

[44] Ante, p. 50.

[45] Erie R. Co. v. Erie & W. Transp. Co., 204 U. S. 220, 27 Sup. Ct. 246, 51 L. Ed. 450; Lehigh Valley R. Co. v. Cornell Steamboat Co., 218 U. S. 264, 31 Sup. Ct. 17, 54 L. Ed. 1039, 20 Ann. Cas. 1235. In both these cases the opinions merely say that this doctrine of contribution is of admiralty origin, without stating whether it arose from average or tort. They could not have treated it as a case of joint liability in tort; for it would have been inconsistent with Union Stockyards Co. v. Chicago, B. & Q. R. Co., 196 U. S. 217, 25 Sup. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525, in which the court adopted the rule of no contribution among negligent tort-feasors at common law. See, also, Eastern Dredging Co., In re (D. C.) 182 Fed. 179.

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ceeding in rem. The liability to the party paying more than his share arises from a maritime tort of the other vessel or those responsible for her navigation. If such a remedy is available in rem under the fifty-ninth rule, it ought to lie in this analogous case.

MEASURE OF DAMAGES

152. The damages assessable in collision cases are those which are the natural and proximate result of the collision.

This subject must be considered—First, in reference to the cases where the loss is total; second, in reference to the cases where the loss is partial; third, what damages are proximate or remote.

SAME—WHEN LOSS TOTAL

153. If the loss is total, the amount recoverable by the vessel owner is the market value of the vessel at the time of the collision, if that is ascertainable, and her net freight for the voyage.[46]

Where a ship cannot be said to have a market value, the method of fixing her value is a question of fact, depending on the circumstances of the particular case. Her original cost, less proper deductions for depreciation, is evidence, though not conclusive or exclusive, of her value.[47]

The net freight allowed in cases of total loss is the net

§ 153. [46] BALTIMORE, 8 Wall. 377, 19 L. Ed. 463; Laura Lee (D. C.) 24 Fed. 483; Fabre v. Cunard S. S. Co., 53 Fed. 288, 3 C. C. A. 534; UMBRIA, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed 1053; Alaska S. S. Co. v. Inland Nav. Co., 211 Fed. 840, 128 C. C. A. 366; Philadelphia, [1917] P. 101.

[47] Lucille (D. C.) 169 Fed. 719; Samson, 217 Fed. 344, 133 C. C. A. 260; Harmonides [1903] P. 1.

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freight for the voyage broken up. Profits on a future charter, not entered upon, are too remote.[48]

In the Kate,[49] the vessel was on her way to perform a charter party when she was lost. The court rather varied the general rule by permitting recovery of her value at the end of the voyage, and the profit under that charter party, as it had already been entered upon. On the other hand, in the Hamilton,[50] the value of the vessel at the beginning of the voyage was allowed, and interest from that date, but not the profits of the charter party which she then had, though she had entered upon it.

In case of a total loss of cargo, the value recoverable is the value at place of shipment, with all expenses added; but, if the loss is only partial, the net values saved must be credited.[51]

The fact that a vessel is sunk does not necessarily make the loss a total one. The owner must make some effort to find out whether she can be saved or not, but, if he shows an unsuccessful effort to induce salvors to raise her, it shifts to the respondent the burden to show that the loss was not total.[52]

[48] UMBRIA, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; Kate, [1899] P. 165; George W. Roby, 111 Fed. 601, 49 C. C. A. 481; Menominee (D. C.) 125 Fed. 530.

[49] [1899] P. 165. See, also, Racine, [1906] P. 273.

[50] (D. C.) 95 Fed. 844.

[51] Scotland, 105 U. S. 24, 26 L. Ed. 1001; George Bell (D. C.) 8 Fed. 581, 5 Hughes, 172; Umbria, 59 Fed. 489, 8 C. C. A. 194.

[52] Normandie (D. C.) 40 Fed. 590; Id. (D. C.) 43 Fed. 151; Ernest A. Hamill (D. C.) 100 Fed. 509; Des Moines, 154 U. S. 584, 14 Sup. Ct. 1168, 20 L. Ed. 821.

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SAME—WHEN LOSS PARTIAL

154. In case of a partial loss, the amount recoverable is the cost of saving the vessel, the repair and expense bills caused by the collision, and a reasonable allowance for the loss of the use of the vessel during any delay caused by the collision.

There is usually but little difficulty in settling the items for actual repairs. The fight generally turns on the amount that should be allowed for the loss of the vessel's use, or demurrage, as it is frequently, though inaccurately, called.

The sum to be allowed is the actual loss caused to the owner by being deprived of his vessel. This is a question of fact, and is often difficult of ascertainment.

The demurrage rate specified in a bill of lading or charter party is not the measure of damages, though it may be competent evidence.[53]

If the vessel is actually under charter, the amount payable per day is strong evidence of her value.[54]

When, however, the vessel is being operated by her owner, the method of fixing the rate varies greatly,

In the Potomac[55] a vessel engaged in a particular business was allowed the daily average of her net profits for the season.

In such cases the rate differs from that in case of total loss, for under partial loss cases the future profits on a charter may be allowed.[56]

Where no charter rate can be fixed, the courts hold that

§ 154. [53] Hermann, 4 Blatchf. 441, Fed. Cas. No. 6,408.

[54] Margaret J. Sanford (C. C.) 37 Fed. 148; Brand, 224 Fed. 391, 140 C. C. A. 77, Ann. Cas. 1917B, 996.

[55] 105 U. S. 630, 26 L. Ed. 1194; Europe, 190 Fed. 475, 111 C. C. A. 307.

[56] Argentino, 14 A. C. 519; UMBRIA, 166 U. S. 421, 17 Sup. Ct. 610, 41 L. Ed. 1053.

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one good way of fixing the damage is to take the vessel's average earnings about the time of the collision.[57]

A company which keeps a spare boat can still recover for the loss of use of their steamer, though the spare boat took its place.[58]

As these damages are allowed simply to make up to the owner any pecuniary loss to which he may be put by being deprived of the use of his vessel, it follows that no allowance for loss of time can be recovered in case of a vessel not operated for profit, but pleasure—like a private yacht—or of vessels not in operation.[59]

On the other hand, in the Greta Holme,[60] the trustees of a municipality which kept a steam dredge for their sole use were allowed to recover for the time lost by it in consequence of a collision damage, though they could not prove any direct pecuniary loss. They did prove, however, that the filling up during the dredge's absence from work entailed additional dredging afterwards.

Interest on the value from the date of collision in case of

[57] CONQUEROR, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; William H. Bailey (D. C.) 103 Fed. 799; Bulgaria (D. C.) 83 Fed. 312; Tremont, 161 Fed. 1, 88 C. C. A. 304; Orion, 239 Fed. 301, 152 C. C. A. 289.

[58] Cayuga, 14 Wall. 270, 20 L. Ed. 828; Mediana, [1899] P. 127; Id., [1900] A. C. 113.

[59] CONQUEROR, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; Saginaw (D. C.) 95 Fed. 703; Wm. M. Hoag (D. C.) 101 Fed. 846; Fisk v. New York (D. C.) 119 Fed. 256; Loch Trool (D. C.) 150 Fed. 429. In Vanadis (D. C.) 250 Fed. 1010, demurrage was allowed for a yacht used only for pleasure; the court attempting (not very successfully) to distinguish it from the Conqueror Case.

[60] [1897] A. C. 596. The tendency of the more recent English decisions has been to allow demurrage for loss of use of government ships, though no actual pecuniary loss is directly proved. Marpessa, [1907] A. C. 241; Astrakhan, [1910] P. 172. Under the American decisions the government can recover crew's wages and keep and other actual expenses, but not demurrage. A. A. Raven, 231 Fed. 380, 145 C. C. A. 374.

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total loss, and on each item in case of partial loss, is usually allowed, though its allowance is a matter of judicial discretion.[61]

In estimating the cost of repairs, the fact that new repairs make the vessel more valuable than she was before, if these new repairs were necessary to restore her, does not cause any deduction. The rule of one-third off new for old, which has been adopted by the insurance companies, does not apply in collision cases.[62]

It is often a difficult question of fact how far the recovery may extend when the vessel is old, and it is necessary to put in a good deal of work on each side of the natural wound in order to make the repairs hold. As a rule, the cost of repairing adjacent parts is not recoverable, provided those adjacent parts were not in good condition. If the vessel is in good condition, and the injury is such that repairs to adjacent parts are also needed, they would be recoverable.[63]

REMOTENESS OF DAMAGES—SUBSEQUENT STORM

155. If a vessel partially injured is so crippled by a collision as to be lost in a subsequent storm, which she could otherwise have weathered, that is, in law, considered as proximately arising from the collision.

[61] Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751. The trend of later decisions is to a liberal policy in its allowance. Rickmers, 142 Fed. 305, 73 C. C. A. 415; J. G. Gilchrist (D. C.) 173 Fed. 666; Id., 183 Fed. 105, 105 C. C. A. 397; Mary B. Curtis, 250 Fed. 9, 162 C. C. A. 181; Great Lakes Dredge & Dock Co., In re (D. C.) 250 Fed. 916.

[62] BALTIMORE, 8 Wall. 377, 19 L. Ed. 463.

[63] John R. Penrose (D. C.) 86 Fed. 696; Providence, 98 Fed. 133, 38 C. C. A. 670.

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The damages recoverable, as in common-law cases, are only those proximately caused by the collision. This is often a difficult question, and the decisions are not always enlightening. For instance, in the common-law case of Memphis & C. R. Co. v. Reeves,[64] tobacco which did not go forward as fast as it might have done was caught in a flood, which it would otherwise have escaped. The court held that the proximate cause was the flood.

In the Leland,[65] a vessel injured in collision while making her way to port was caught in a storm, and, in consequence of her crippled condition, was totally wrecked. It was contended that the proximate cause of her main damage was the storm, but the court held that it was the collision, and that the vessel at fault was liable for the entire loss.

In the City of Lincoln,[66] the compass, charts, log, and log glass of a bark were lost in a collision. On making her way to port, she grounded on account of the lack of these requisites to navigation. The court held that the additional damage received in grounding was due proximately to the collision, and recoverable.[67]

SAME—DOCTRINE OF ERROR IN EXTREMIS

156. If a vessel, by her negligence, places the other in a perilous situation, and the latter, in the excitement, takes the wrong course, the negligence of the first is considered the proximate cause.

This is the "doctrine of error in extremis," and applies, as is well known, to all cases of negligence. The reason is

§ 155. [64] 10 Wall. 176, 19 L. Ed. 909.

[65] (D. C.) 19 Fed. 771.

[66] 15 P. D. 15.

[67] See, also, Boutin v. Rudd, 82 Fed. 685, 27 C. C. A. 526; Onoko (D. C.) 100 Fed. 477; Id., 107 Fed. 984, 47 C. C. A. 111; Mellona, 3 W. Rob. 7; Peasher, Swa. 211; Reischer v. Borwick, [1894] 2 Q. B. 548; Bruxelleville, [1908] P. 312; ante, § 35, p. 80.

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that it is not right to expect superhuman presence of mind, and therefore, if one vessel has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind.[68]

This doctrine has been enunciated in many American cases. Illustrations may be found in the cases which hold that a steamer must not run so close to a sailing vessel as to cause her alarm and trepidation.[69]

It applies just as well, however, to steamers.[70]

But the vessel which appeals to this doctrine must show that she was not in fault herself. She cannot claim to be free from negligence at the last moment on account of excitement, if her previous maneuvers have brought about the critical situation.[71]

§ 156. [68] Bywell Castle, 4 P. D. 219; NICHOLS, 7 Wall. 656, 19 L. Ed. 157; Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175; Charles Hubbard, 229 Fed. 352, 143 C. C. A. 472.

[69] Carroll, 8 Wall. 302, 19 L. Ed. 392; LUCILLE, 15 Wall. 676, 21 L. Ed. 247; Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; ante, p. 280.

[70] Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469.

[71] ELIZABETH JONES, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812; Protector, 113 Fed. 868, 51 C. C. A. 492; Noreuga (D. C.) 211 Fed. 356; Manchioneal, 243 Fed. 801, 156 C. C. A. 313.

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CHAPTER XV

OF VESSEL OWNERSHIP INDEPENDENT OF THE LIMITED LIABILITY ACT

157. Method by Which Title to Vessels may be Acquired or Transferred.
158. Relation of Vessel Owners Inter Sese.
159. Relation of Vessel Owners as Respects Third Parties.

METHOD BY WHICH TITLE TO VESSELS MAY BE ACQUIRED OR TRANSFERRED

157. Title to vessels may be acquired by construction or by purchase.

A bill of sale is necessary before the vessel can be documented or enjoy the privileges of an American vessel, but not for the transfer of title.

A prospective vessel owner may build his own vessel, whether individually or by contract, or he may purchase it from some one else.

The question when title passes in case of a ship under construction is one of intent under the contract of construction. The fact that the contract price is payable in installments is not necessarily an indication of an intent that title shall pass pro tanto.[1]

A vessel is a mere piece of personal property, and sale, accompanied by delivery, will pass the title. Such a sale may be proved by parol, as in any other case of personalty.[2]

§ 157. [1] U. S. v. Ansonia Brass & Copper Co., 218 U. S. 452, 31 Sup. Ct. 49, 54 L. Ed. 1107; Poconoket (D. C.) 67 Fed. 262; Id., 70 Fed. 640, 17 C. C. A. 309; Id., 168 U. S. 707, 18 Sup. Ct. 939, 42 L. Ed. 1214. In England the presumption is the other way. Seath v. Moore, 11 A. C. 350, 380.

[2] Badger v. President, etc., of Bank of Cumberland, 26 Me. 428; Chadbourne v. Duncan, 36 Me. 89.

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Section 4170 of the Revised Statutes of the United States provides:

"Whenever any vessel, which has been registered, is, in whole or in part, sold or transferred to a citizen of the United States, or is altered in form or burden, by being lengthened or built upon, or from one denomination to another, by the mode or method of rigging or fitting, the vessel shall be registered anew, by her former name, according to the directions hereinbefore contained, otherwise she shall cease to be deemed a vessel of the United States. The former certificate of registry of such vessel shall be delivered up to the collector to whom application for such new registry is made, at the time that the same is made, to be by him transmitted to the register of the treasury, who shall cause the same to be canceled. In every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite, at length, the certificate; otherwise the vessel shall be incapable of being so registered anew." [3]

The only effect of not having the required bill of sale, or of having a bill of sale without the certificate set out in it, is to cause the vessel to forfeit its rights to American papers.[4]

In order to make this title binding as against third parties, it must be recorded in the custom house. Section 4192 of the United States Revised Statutes provides:

"No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hy-

[3] U. S. Comp. St. § 7751.

[4] Amelie, 6 Wall. 18, 18 L. Ed. 806; De Wolf v. Harris, 4 Mason, 515, Fed. Cas. No. 4,221; Orlando v. Wooten (D. C.) 214 Fed. 271. A bill of sale need not be under seal. Hunter v. Parker, 7 M. & W. 322, 331.

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pothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage, by a loan of money or materials necessary to repair or enable her to prosecute her voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section." [5]

If it is recorded according to this section, it is binding as to third parties, though not indexed.[6]

This statute has been held constitutional by the United States Supreme Court.[7]

The place where the vessel is registered or enrolled is regulated by section 4141 of the Revised Statutes, which says:

"Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides." [8]

These statutes, above quoted, which in terms apply to registered vessels, are made to apply to enrolled vessels by section 4312 of the Revised Statutes, which says:

"In order for the enrollment of any vessel, she shall possess the same qualifications, and the same requirements in all respects shall be complied with, as are required before registering a vessel; and the same powers and duties are conferred and imposed upon all officers respectively, and the same proceedings shall be had, in enrollment of vessels, as are prescribed for similar cases in registering; and vessels enrolled, with the masters or owners thereof, shall be

[5] U. S. Comp. St. § 7778.
[6] W. B. Cole (C. C.) 49 Fed. 587; Id., 59 Fed. 182, 8 C. C. A. 78.
[7] WHITE'S BANK v. SMITH, 7 Wall. 646, 19 L. Ed. 211.
[8] U. S. Comp. St. § 7719.

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subject to the same requirements as are prescribed for registered vessels." [9]

These bills of sale are required not only to be recorded, but they must set out exactly the interest of each person selling and each person purchasing.[10]

A vessel engaged in foreign trade is said to be registered, one engaged in the coasting or internal trade on navigable waters of the United States is said to be enrolled, and one of the latter class under twenty tons is said to be licensed.[11]

RELATION OF VESSEL OWNERS INTER SESE

158. Part owners of a vessel, in the absence of special agreement, are tenants in common, not partners.

The presumption is in favor of a tenancy in common and against a partnership, though the latter may exist by special agreement. This has been settled law, both in England and America, for a long time.[12]

The fact that a vessel is run on shares does not constitute the part owners a partnership.[13]

Part owners have no lien as against each other in case one pays more than his share of the expenses or debts,

[9] U. S. Comp. St. § 8058.

[10] Rev. St. §§ 4192–4196 (U. S. Comp. St. §§ 7778–7782).

[11] Mohawk, 3 Wall. 566, 18 L. Ed. 67; Montello, 11 Wall. 411, 20 L. Ed. 191. The vessels entitled to American papers are set out in section 4132 of the Revised Statutes (as last amended, in U. S. Comp. St. § 7709). The form of register is given in section 4155 of the Revised Statutes (U. S. Comp. St. § 7736); the form of enrolment in section 4319 of the Revised Statutes (U. S. Comp. St. § 8065); and the form of license in section 4321 of the Revised Statutes (U. S. Comp. St. § 8069).

§ 158. [12] Bradshaw v. Sylph, Fed. Cas. No. 1,791; Revens v. Lewis, 2 Paine, 202, Fed. Cas. No. 11,711; SPEDDEN v. KOENIG, 78 Fed. 504, 24 C. C. A. 189; Briggs & Cobb v. Barnett, 108 Va. 404, 61 S. E. 797.

[13] Daniel Kaine (D. C.) 35 Fed. 785.

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though the one so paying may be the ship's husband. This question was long a subject of debate in the courts, but the above may be considered as the settled doctrine now.[14]

In such case, however, when he has made necessary advances for the common benefit, under express or implied authority to do so, he may compel contribution from the owners for such advances; but this is a mere matter of accounts, and there is no jurisdiction in admiralty to maintain such a suit.[15]

The complete separation of vessel and owner in admiralty is forcibly illustrated by the decisions that a part owner, who happens to be engaged in the business of furnishing repairs or supplies to vessels, may libel his vessel for such repairs and supplies so furnished, and may assert a lien against his other part owners or their assignee, but not to the detriment of creditors of the vessel itself. This doctrine must be carefully distinguished from the doctrine announced in the last paragraph. For a mere balance of accounts there is no right of action in admiralty, but, if a part owner of a vessel happens to keep a machine shop, and does work upon the vessel on the credit of the vessel, there is no reason why he should not be allowed to libel the vessel, and to assert such a maritime cause of action against his other part owners. But, when the vessel comes to be sold, if there are other creditors, it would be inequitable to allow the part owner, who himself may be personally bound, to assert a lien against his own creditors; and therefore the doctrine is limited to an assertion of it in subordination to the claims of the other creditors on the boat.[16]

[14] LARCH, 2 Curt. 427, Fed. Cas. No. 8,085; Daniel Kaine (D. C.) 35 Fed. 785.

[15] LARCH, 2 Curt. 427, Fed. Cas. No. 8,085; Orleans, 11 Pet. 175, 9 L. Ed. 677.

[16] PETTIT v. CHARLES HEMJE, 5 Hughes, 359, Fed. Cas. No. 11,047a; West Friesland, Swa. 454; Learned v. Brown, 94 Fed. 876,

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The decisions on this question, however, are not harmonious; some courts confusing it with the doctrine that there is no jurisdiction in the admiralty as to accounts among part owners.

But there are many cases where this question could not possibly be involved, like a personal injury claim, a claim for loss of goods shipped, or arising out of a collision. There can be no sound reason why a part owner should not be permitted to proceed against the vessel in such cases, always in subordination to other debts for which he is also responsible.[17]

There is nothing in the relation of part owners which makes one an agent for the other any more than there is in the relation of tenants in common. Hence one part owner, in the absence of some authority, express or implied, cannot bind the other part owner for the debts of the vessel. If cases exist in which the other part owner has been held bound, it will be found that there was some course of dealing or other circumstance tending to show express or implied authority.[18]

Disputes often arise between part owners as to the method of using their vessel. If they cannot agree, the majority owner can take the vessel, and use her, and in such case he will be entitled to the profits of the voyage, but the part owner may require him to give security for the protection of his interest in the vessel against loss, and admiralty has jurisdiction of a libel to compel the giving of such security.[19]

36 C. C. A. 524; Fredericka Schepp (D. C.) 195 Fed. 623; Puritan (D. C.) 258 Fed. 271.

[17] See the discussion of this subject by the author in his article on Maritime Liens, 26 Cyc. 757, note 62.

[18] Brodie v. Howard, 17 C. B. (84 E. C. L.) 109; FRAZER v. CUTHBERTSON, 6 Q. B. D. 93.

[19] Coyne v. Caples (D. C.) 8 Fed. 638; Tunno v. Betsina, Fed. Cas. No. 14,236; Scull v. Raymond (D. C.) 18 Fed. 547; post, p. 516.

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In such case a minority owner who is protected by such a bond, and who has refused to join in the voyage, cannot claim a share in its profits, as he has had none of the risk.[20]

In cases of disagreement the majority owner has the right to the use of the vessel, subject to the right of the minority to require bond; but, if the majority will not use the vessel at all, then the minority can use her on giving a similar bond to the majority. The reason of this is the principle of public policy that vessels should be used, and, while the majority in case of difference as to the precise voyage or the precise method of use can control, they cannot control it so far as to require the vessel to be laid up.[21]

Although admiralty does not have jurisdiction to decree a sale of a vessel for purpose of partition where the interests in the vessel are unequal—for in that case the majority can rule—yet, if the interests are equal, and the equal interests disagree as to the method of employment of the vessel, then in that case neither can compel the other to give way, and admiralty has jurisdiction to decree a sale of the vessel.[22]

In England there was no jurisdiction in admiralty to sell for partition until the Act of 24 Vict. c. 10. The eighth section of that act gives such jurisdiction, whether as between equal or unequal interests, and also of all matters of account between part owners.[23]

[20] Marengo, 1 Low. 52, Fed. Cas. No. 9,065; Head v. Amoskeag Mfg. Co., 113 U. S. 9, 5 Sup. Ct. 447, 28 L. Ed. 889.

[21] Tunno v. Betsina, Fed. Cas. No. 14,236; Orleans, 11 Pet. 175, 9 L. Ed. 677; Gould v. Stanton, 16 Conn. 12; Southworth v. Smith, 27 Conn. 355, 71 Am. Dec. 72; England, 12 P. D. 32.

[22] Ocean Belle, 6 Ben. 253, Fed. Cas. No. 10,402; Tunno v. Betsina, Fed. Cas. No. 14,236; Coyne v. Caples (D. C.) 8 Fed. 638; Head v. Amoskeag Mfg. Co., 113 U. S. 9, 23, 5 Sup. Ct. 447, 28 L. Ed. 889. In such case the court may take necessary incidental accounts. Emma B. (D. C.) 140 Fed. 771.

[23] Apollo, 1 Hagg. Ad. 306. Smith's Admiralty Law & Practice (Ed. 1892) 46 et seq.

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On the principle that the majority rules, a majority may remove the master of the vessel at any time, even without cause, and though he is part owner; but, if they remove him prior to the time for which they had agreed to keep him, or in any way break their contract with him, they are liable to an action for damages. Their power of removal, however, is clear, except when there is a written agreement to the contrary. On this subject section 4250 of the Revised Statutes says:

"Any person or body corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner. This section shall not apply where there is a valid written agreement subsisting, by virtue of which such master would be entitled to possession, nor in any case where a master has possession as part owner, obtained before the ninth day of April, eighteen hundred and seventy-two." [24]

In disputes with vessel owners admiralty takes cognizance only of legal titles, not of equitable.[25]

The admiralty procedure to obtain possession of a ship is a petitory or possessory libel.[26]

[24] Lizzie Merry, 10 Ben. 140, Fed. Cas. No. 8,423; Montgomery v. Wharton, Fed. Cas. No. 9,737; Same v. Henry, 1 Dall. 49, 1 L. Ed. 32, 1 Am. Dec. 223; Eliza B. Emory (C. C.) 4 Fed. 342; Lombard S. S. Co. v. Anderson, 134 Fed. 568, 67 C. C. A. 432. Section 4250 of the Revised Statutes is contained in U. S. Comp. St. § 7995.

[25] Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269; Robert R. Kirkland (D. C.) 92 Fed. 407; United Transportation & Lighterage Co. v. New York & Baltimore Transp. Line (D. C.) 185 Fed. 386, 107 C. C. A. 442.

[26] Nellie T., 235 Fed. 117, 148 C. C. A. 611.

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RELATION OF VESSEL OWNERS AS RESPECTS THIRD PARTIES

159. Vessel owners are liable in solido for the debts or torts of the vessel incurred in the natural course of business by parties holding the relation of agent to such vessel owners.

This is a long-settled principle of English and American law.[27]

The parties who are usually the agents of the vessel are the master and the managing owner. These are frequently combined in the same person, and their powers are substantially the same. They may bind the owners for debts in the usual and natural employment of the vessel.

A clear statement of the powers of the ship's managing owner (which is practically another term for the ship's husband) is set out in volume 1, § 428, of Bell's Commentaries, which enumerates them as follows, and also the limitation on his powers:

(1) To see to the proper outfit of the vessel, in the repairs adequate to the voyage, and in the tackle and furniture necessary for a seaworthy ship. (2) To have a proper master, mate, and crew for the ship, so that in this respect it shall be seaworthy. (3) To see to the due furnishing of provisions and stores, according to the necessities of the voyage. (4) To see to the regularity of all the clearances from the custom house, and the regularity of the registry. (5) To settle the contracts, and provide for the payment of the furnishings which are requisite in the performance of those duties. (6) To enter into proper charter parties, or engage the vessel for general freight, under the usual con-

§ 159. [27] Thompson v. Finden, 4 Car. & P. 158, 19 E. C. L. 320; Nestor, 1 Sumn. 73, Fed. Cas. No. 10,126; Gallatin v. Pilot, 2 Wall. Jr. 592, Fed. Cas. No. 5,190.

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ditions; and to settle for freight and adjust average with the merchant. (7) To preserve the proper certificates, surveys, and documents, in case of future disputes with insurers or freighters, and to keep regular books of the ship."

In a well-considered American case his powers are enumerated as follows:

"To provide for the complete seaworthiness of the ship; to see that she has on board all necessary and proper papers; to make contracts for freight; to collect the freight and enter into proper charter parties; to direct the repairs, appoint the officers and mariners; to see that the vessel is furnished with provisions and stores; and generally to conduct all the affairs and arrangements for the due employment of the ship in commerce and navigation." [28]

Mr. Bell in treating of the limitations of the powers of a ship's husband, says:

"(1) That, without special powers, he cannot borrow money generally for the use of the ship, though he may settle the accounts of the creditors for furnishings, or grant bills for them, which will form debts against the concern, whether he has funds in his hands or not, with which he might have paid them. (2) That, although he may, in the general case, levy the freight, which is, by the bill of lading, payable on the delivery of the goods, it would seem that he will not have power to take bills for the freight, and give up the possession and lien over the cargo, unless it has been so settled by charter party, or unless he has special authority to give such indulgence. (3) That, under general authority as ship's husband, he has no power to insure, or to bind the owners for premiums; this requiring a special authority. (4) That, as the power of the master to enter into contracts of affreightment is superseded in the port of the

[28] Chase v. McLean, 130 N. Y. 529, 29 N. E. 986. As to his powers as agent; see, also, Great Lakes Towing Co. v. Mills Transp. Co., 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 709; Benjamin Noble, 244 Fed. 95, 156 C. C. A. 523.

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owners, so is it by the presence of the ship's husband, or the knowledge of the contracting parties that a ship's husband has been appointed."

Accordingly, it has been held that his powers do not extend so far as to permit him to bind the owners for the cargo purchased for the vessel, that not being considered as a necessity in the course of business.[29]

The managing owner cannot bind the others in the home port unless express authority be shown, for the basis of his power is the necessity of the vessel, and in the home port the owners can easily be consulted.[30]

Nor can he bind minority owners who have dissented from the use of the vessel for that particular voyage, for, as they cannot, in such case, share in the profits, it would be inequitable to expect them to bear the costs.[31]

The supplies for which part owners may be bound by their agents are simply those things included in the term "necessaries." In another connection the question as to what constitutes "necessaries" which a captain may order for his vessel has been discussed, and the same test applies here. Reference is made to that discussion.[32]

The owners are liable not only for contract debts, but also for the torts of the master in the line of his duty, not for those outside the line of his duty. For instance, in The Waldo[33] the owners were held liable for injury to goods

[29] Ole Oleson (C. C.) 20 Fed. 384.

[30] SPEDDEN v. KOENIG, 78 Fed. 504, 24 C. C. A. 189; Woodall v. Dempsey (D. C.) 100 Fed. 653; Besse v. Hecht (D. C.) 85 Fed. 677; Helme v. Smith, 7 Bing. 709, 20 E. C. L. 300; Briggs & Cobb v. Barnett, 108 Va. 404, 61 S. E. 797. This power to bind the owners personally in the home port must not be confused with his power to bind the ship under Act June 23, 1910; ante, chapter lv.

[31] FRAZER v. CUTHBERTSON, 6 Q. B. D. 93; Vindobala, 13 P. D. 42; Id., 14 P. D. 50; Scull v. Raymond (D. C.) 18 Fed. 547; Stedman v. Feidler, 20 N. Y. 437.

[32] Ante, p. 107.

[33] Waldo, 2 Ware, 165, Fed. Cas. No. 17,056. See, also, Taylor

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on a vessel while in transit, but not for damages received by their sale and disposition after they had been taken from the vessel; the master, as to these latter transactions, being considered the agent of the shippers, and not of the vessel owners.

The fact that a person appears on the papers of the vessel as owner does not make him liable. As seen above, he is not liable if he has expressly dissented from the voyage. In addition, if the bill of sale or title which he holds is a mere security, as a mortgage in disguise, and he has not the possession of the vessel, he is not liable. The question reduces itself to one of agency. In such case, as he has not possession, he has not the power of appointment or control, and the parties operating the vessel are not his agents. Even if the vessel is run on shares by the master, that does not constitute him their agent.[84]

v. Brigham, 3 Woods, 377, Fed. Cas. No. 13,781; ante, p. 215.

[84] Myers v. Willis, 17 C. B. (84 E. C. L.) 77; Webb v. Peirce, 1 Curt. 104, Fed. Cas. No. 17,320; Davidson v. Baldwin, 79 Fed. 95, 24 C. C. A. 453; Morgan v. Shinn, 15 Wall. 105, 21 L. Ed. 87.

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CHAPTER XVI

OF THE RIGHTS AND LIABILITIES OF OWNERS AS AFFECTED BY THE LIMITED LIABILITY ACT

160. History of Limitation of Liability in General.
161. History and Policy of Federal Legislation.
162. By Whom Limitation of Liability may be Claimed.
163. Against what Liabilities Limitation may be Claimed.
164. Privity or Knowledge of Owner.
165. The Voyage as the Unit.
166. Extent of Liability of Part Owners.
167. Measure of Liability—Time of Estimating Values.
168. Prior Liens.
169. Damages Recovered from Other Vessel.
170. Freight.
171. Salvage and Insurance.
172. Procedure—Time for Taking Advantage of Statute.
173. Defense to Suit against Owner, or Independent Proceeding.
174. Method of Distribution.

HISTORY OF LIMITATION OF LIABILITY IN GENERAL

160. The limitation of owner's liability is an outgrowth of the modern maritime law and codes.

Under the ancient civil law the owners were bound in solido for the liabilities of the ship arising out of contract, and in proportion to their respective interests for liabilities arising out of tort. This, however, merely settled the question of proportion as between the owners, but not the question of the extent of their liability. There seems to have been no limit on this as respects the value of the vessel. But the importance of encouraging maritime adventures, especially in the Middle Ages, when that was almost the only method of communication among nations, led to the gradual adoption, among the maritime continental codes, of

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provisions limiting the liability of the owners to their respective interests in the ship. The greater frequency of maritime disasters in those days of frail craft emphasized the need of such a provision. Among others, we find these carried into the famous marine Ordonnance of Louis XIV, one provision of which is that the owners of a ship shall be answerable for the deeds of the master, but shall be discharged, abandoning their ship and freight.[1]

In the last century this policy was partially adopted in England, though their act of limited liability was then, and still is, less favorable to the vessel owner than most of the other acts.

The history of the development of this principle of modern maritime law is summarized by Judge Ware in the REBECCA,[2] decided long before there was any federal statute on the subject.

HISTORY AND POLICY OF FEDERAL LEGISLATION

161. The federal statutes are sections 4282–4289, Rev. St.,[3] Act June 26, 1884,[4] and Act June 19, 1886.[5] They are designed to encourage shipping by extending all possible protection to vessel owners..

In one sense the Harter Act (U. S. Comp. St. §§ 8029–8035) is an act limiting the liability of owners. This, however, regulates not so much their liability in amount as the question whether they are responsible at all or not. But the acts immediately in view in the principal connection are rather those limiting the amount of their liability where

§ 160. [1] 30 Fed. Cas. p. 1,206.
[2] 1 Ware (188) 187, Fed. Cas. No. 11,619.
[3] U. S. Comp. St. §§ 8020–8027.
[4] 23 Stat. 57 (U. S. Comp. St. § 8028); post, p. 494.
[5] 24 Stat. 80 (U. S. Comp. St. § 8027); post, p. 497.

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some liability undoubtedly exists, and not the acts defining whether or not they are liable at all.

The first act above mentioned, now contained in sections 4282–4289 of the Revised Statutes, was passed on March 3, 1851, and is similar to the British statute, although in many respects the act itself and the construction placed upon it by the courts is more liberal to the vessel owner.

The statutes regulating the relation of shippers and carriers were not intended to repeal these statutes pro tanto, or to change their policy.[6]

Policy of the Act

The policy of these acts is explained by Mr. Justice Bradley in NORWICH & N. Y. TRANSP. CO. v. WRIGHT,[7] a leading case on the subject. In it he says:

"The great object of the law was to encourage shipbuilding, and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal

[6] So held as to the section of the Interstate Commerce Act which defines the carriers, whether by land or by water, which are subject to its provisions, and also as to the amendment making the initial carrier primarily responsible. 24 Stat. 379 (U. S. Comp. St. § 8563), and 34 Stat. 595 (U. S. Comp. St. § 8604aa); Hoffmans (D. C.) 171 Fed. 455; Burke v. Gulf, C. & S. F. Ry. Co. (Mun. Ct. N. Y.) 147 N. Y. Supp. 794.

[7] 13 Wall. 104, 20 L. Ed. 585. See, also, Deslions v. La Compagnie Générale Transatlantique, 210 U. S. 95, 120, 28 Sup. Ct. 664, 673, 52 L. Ed. 973.

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improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent? The public interests require the investment of capital in shipbuilding quite as much as in any of these enterprises. And, if there exist good reasons for exempting innocent shipowners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same extent from personal liability in cases of collision. In the one case as in the other, their property is in the hands of agents whom they are obliged to employ."

Liability for Fires—"Design or Neglect"

The first section of this act[8] does (contrary to the remaining portion of it) define certain circumstances under which the question of the responsibility of the vessel owner is involved, rather than the question of its extent. It provides, in substance, that there shall be no liability at all for a fire unless the fire is caused by the design or neglect of the owner. This, therefore, furnishes a complete defense to any liability, and not, as the remainder of the act, a method of surrendering an interest in the vessel itself as a means of limiting the liability.

The meaning of these words "design or neglect" came up in Walker v. Western Transp. Co.,[9] and the construction placed upon them by the courts is, in substance, that the owners are exempted, though there might be some design or neglect of their agents or employés, provided the vessel owner was not guilty of any personal design or neglect. In the opinion of the court Mr. Justice Miller says:

"It is quite evident that the statute intended to modify the shipowner's common-law liability, for everything but

[8] Rev. St. § 4282 (U. S. Comp. St. § 8020).

[9] 3 Wall. 150, 18 L. Ed. 172. See, also, Ingram & Royle, Ltd., v. Services Maritimes, [1913] 1 K. B. 538.

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the act of God and the king's enemies. We think that it goes so far as to relieve the shipowner from liability for loss by fire, to which he has not contributed either by his own design or neglect.

"By the language of the first section the owners are released from liability for loss by fire in all cases not coming within the exception there made. The exception is of cases where the fire can be charged to the owner's design or the owner's neglect.

"When we consider that the object of the act is to limit the liability of owners of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners. * * * We are, therefore, of opinion that, in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel, in which he does not participate personally."

The later case of the Strathdon [10] involved an injury to the cargo from a heated flue in the ship. It appeared that the ship had been built by reputable builders. District Judge Thomas, in delivering the opinion of the court, discussed these words as follows:

"Hence the shipowners are not liable for injury to the cargo by fire, unless the cargo owner prove by a preponderance of evidence that the fire was caused by the design or neglect of the shipowners touching some duty that was imposed on them personally. A strained meaning should not be given to the words 'design or neglect.' The word 'design' contemplates a causative act or omission, done or suffered willfully or knowingly by the shipowner. It in-

[10] (D. C.) 89 Fed. 374. See, also, Diamond, [1906] p. 282 (an overheated stove).

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volves an intention to cause the fire, or to suffer it to be caused by another. The culpability is in the nature of a trespass. It is not understood that there is any claim that the fire in question was caused by such design of the shipowners. The word 'neglect' has an opposite meaning. Negligence involves the absence of willful injury, and is an unintended breach of duty, resulting in injury to the property or person of another. Were the shipowners guilty of such breach of duty? The duty was to use due care (and it may be assumed that a high degree of care would be required) to furnish a donkey boiler, if one were furnished at all, so related to the other parts of the ship that the cargo carried in the ship would not be fired, directly or indirectly, by the action of such a boiler, at least when properly used. What should suitably prudent proposed shipowners do to fulfill this duty? If they were not competent shipbuilders, they should engage persons of proper skill and carefulness, and delegate to them the performance of the duty. If the duty could not be delegated so as to exempt them from liability, yet the care and skill of the builders would inure to the benefit of the shipowners. * * * If, now, the shipowner has employed such reputable constructors, and if the use of the completed ship for several years justify the propriety of its arrangement and precaution against fire, and if very skilled men pronounce that the work accords with the existing knowledge of their profession, and if no man be forthcoming to declare otherwise, why should the shipowners be held to have failed in skill or diligence? Their care and skill should be equal to the prevailing knowledge of the mechanism which they undertake to construct and use, and to that standard they have attained. If there was any higher skill or ability existing at any time before the fire, evidence of it should have been given. In the absence of such evidence, and in view of the ample proof that what was known on the subject was employed in the construction of the donkey boiler and flue, the shipowners must

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be considered suitably diligent. It results that they are not liable for the injury to the cargo resulting from the fire."

Under this first section exempting the ship from entire liability, it has been held, in considering the peculiar phraseology of the section itself, that it only applied to fire on the ship, or to fires originating off the ship, and then communicating to the ship, and damaging goods on the ship. If the injury was received to goods on the wharf, or a wharfboat alongside of the ship, there would not be any exemption from liability under the terms of this first section.[11]

At the same time, an injury by fire, though not on the ship, can be set up in partial exemption under section 4283; as injuries by fire occurring without the privity or knowledge of owners come under the terms of that section.[12]

Hence, as to injuries by fire, the question of exemption may arise in two ways: First, if it occurred on board the ship without any personal design or neglect of the shipowner, complete exemption from liability can be pleaded; second, if it occurs in such way as to render the ship or the shipowner liable, the owner may plead partial exemption by surrendering the vessel and freight under the terms of section 4283.

Exemption from Contract Liability by Act June 26, 1884

The act of 1851 remained substantially as originally drafted, with the exception of two slight amendments (which are embodied in the text in the last edition of the Revised Statutes), until 1884.

But section 18 of the act of June 26, 1884, greatly extended its provisions. This section was not, in terms, an amendment of the act of 1851. This first act had only applied to cases ex delicto. By the new act the owners were allowed to limit their liability to their proportionate interests in

[11] Egypt (D. C.) 25 Fed. 320; City of Clarksville (D. C.) 94 Fed. 201; Black v. Ashley, 80 Mich. 90, 44 N. W. 1120.

[12] PROVIDENCE & N. Y. S. S. CO. v. HILL MFG. CO., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038.

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the vessel against obligations incurred by a master or part owner, whether on contract or tort. But this was only to debts for which they would become liable on account of their ownership in the vessel, and did not apply to personal contracts of their own.[13]

The difference between the two acts is explained in the Annie Faxon,[14] where the court says:

"We fail to find in the language of the eighteenth section of the act of June 26, 1884, a purpose to repeal the provisions of any pre-existing statute. While its terms are vague, it would appear that the sole object of the act was to fix the liability of the shipowners among themselves, and extend their right to limit their liability under the provisions of section 4283 to all cases of debt and liability under contract obligations made on account of the ship, with the exception of wages due employés. In Chappell v. Bradshaw (C. C.) 35 Fed. 923, the court construed it thus: 'There are no words in it which signify that it was intended to be a repealing statute. It appears to be another section, intended to take its place at the end of the act of 1851, as that act is given in the Revised Statutes. It is another section, extending the exemption of shipowners to all or any debts or liabilities of the ship, except seamen's wages and liabilities incurred before the passage of the act of 1884. Where a subsequent statute can be so construed as not to bring it in direct conflict with an antecedent law, it will not be held by the courts to repeal the former statute. Repeals by implication are seldom allowed, and to do so in this instance would be to do violence to the intention of Congress, which appears to have been to extend the act of 1851 to

[13] Pendleton v. Benner Line, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770; Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 39 Sup. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522; Capitol Transp. Co. v. Cambria Steel Co., 249 U. S. 334, 39 Sup. Ct. 292, 63 L. Ed. 631.

[14] 75 Fed. 312, 21 C. C. A. 366.

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exempt shipowners from liabilities not embraced in this act.' In Gokey v. Fort (D. C.) 44 Fed. 364, Brown, J., said: 'I think the act of 1884 is doubtless to be treated as in pari materia with the act of 1851 (Rev. St. §§ 4233–4285), and designed to extend the act of 1851 to cases of the master's acts or contracts, and thus to bring our law into harmony with the general maritime law on this subject.'"

Amendment of June 19, 1886—Constitutionality

The act of June 19, 1886, was, in terms, an amendment of the act of 1851. The original act had debarred from its benefits the owners of any canal boat, barge, or lighter, or any vessel used in rivers or inland navigation. There had been some discussion as to the meaning of "inland navigation" under this law, and it had been held, among others, that the exception did not apply to the Great Lakes.[15]

The question of the constitutionality of these acts has been considered in two notable cases. In Lord v. Goodall, N. & P. S. S. Co.,[16] the constitutionality of the act was upheld under the commerce clause of the Constitution; that being a case of a vessel which navigated the high seas between ports of the same state. But afterwards the question as to the validity of the law in relation to vessels engaged solely in inland navigation came before the court, and the constitutionality of the law was sustained under the admiralty clause of the Constitution, independent of the commerce clause. The reasoning of the court is, in substance, that the doctrine of limited liability is an established part of the general maritime law, and that, while that general law has no place in our jurisprudence until adopted, the right to adopt it at any time is clearly vested in Congress. This question has been discussed fully in the chapter re-

[15] Craig v. Continental Ins. Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886.

[16] 4 Sawy. 202, Fed. Cas. No. 8,506; Id., 102 U. S. 541, 26 L. Ed. 224.

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lating to injuries resulting in death, to which reference is made.[17]

BY WHOM LIMITATION OF LIABILITY MAY BE CLAIMED

162. The benefit of the act may be claimed by any owner or part owner who had no privity or knowledge of the fault which gave rise to the liability.

Where a vessel is owned by several parties, and incurs liabilities, though those liabilities are incurred by the master or managing owner, the other part owners, who had no privity or knowledge of it, can claim the benefit of the act, and limit their responsibility to the value of their several part interests. This applies to debts and liabilities contracted in the usual course of trade of a vessel, as well as to torts.[18]

Its benefits may be claimed by the underwriter to whom a vessel has been abandoned, and against any liability incurred while the vessel is in charge of their agent.[19]

As the act is part of the general maritime law, it may be claimed by a foreigner.[20]

But it can be claimed only by an owner or charterer operating the ship. One who hires a ship under a contract which leaves her operation to some one else cannot take advantage of the statute.[21]

[17] Ante, p. 237; In re Garnett, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631.

§ 162. [18] In re Leonard (D. C.) 14 Fed. 53; Warner v. Boyer (D. C.) 74 Fed. 873; S. A. McCaulley (D. C.) 99 Fed. 302; Douse v. Sargent (D. C.) 48 Fed. 695.

[19] Craig v. Continental Ins. Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886.

[20] SCOTLAND, 105 U. S. 24, 26 L. Ed. 1001; Titanic v. Mellor, 233 U. S. 718, 34 Sup. Ct. 754, 58 L. Ed. 1171.

[21] Smith v. Booth (D. C.) 110 Fed. 680; Id., 122 Fed. 626, 58 C. C. A. 479; In re Reichert Towing Line, 251 Fed. 214, 163 C. C. A. 370.

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AGAINST WHAT LIABILITIES LIMITATION MAY BE CLAIMED

163. Under the original act, the only liabilities against which exemption could be pleaded were those over which an admiralty court would have jurisdiction, whether in point of fact they were being asserted in an admiralty court or in a common-law court having concurrent jurisdiction.

But under the amendment of June 26, 1884, the defense was authorized against nonmaritime causes of action also.

The leading decision laying this down as the test under the original act is EX PARTE PHENIX INS. CO.[22] In that case a fire had communicated from the vessel to the shore, and had done damage on the shore. It was contended that the vessel owner could limit his liability against such a cause of action as this, and that it came within the language of the statute. The court, however, held that, as a cause of action originating on water, but consummate on land, could not be asserted in an admiralty court, the owner could not claim the benefit of the act, it being a part of the general maritime law, and resting mainly on that law for its validity.[23]

As examples of such causes of action, the defense has been sustained against fires on vessels,[24] and it may be pleaded not only against loss or damage to property, but also against personal injuries, including those resulting in death; and not only against those injured on the vessel itself which is setting up the exemption, but those also injured upon

§ 163. [22] 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274.
[23] See, also, Goodrich Transp. Co. v. Gagnon (C. C.) 36 Fed. 123.
[24] Ante, p. 348.

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another vessel by the negligence of the vessel asserting the exemption.[25]

This includes injuries due to collision.[26]

Though the test of maritime jurisdiction was applied as to cases under the original act, the Supreme Court has held that the intent of the amendment of June 26, 1884, was to extend the exemption to nonmaritime causes of action as well, whether in contract or tort, in pursuance of the policy of encouraging American shipping.[27]

In this respect the policy of the act differs from that of the Harter Act. It has been seen [28] that the Harter Act is held to regulate only the relations between a shipper and his own ship, and not to affect any rights of action which parties on another ship injured by the offending ship may have.

On the other hand, this act enables the owner to defend himself not only against his own shippers or passengers, but against those on the other vessel as well. The reason for the difference of policy is that the Harter Act works an entire exemption from all liability, whereas this act permits the injured party to subject the owner's interest in the vessel, and merely protects the owner from additional liability beyond the value of his vessel.

The act may be invoked even against unseaworthiness caused by negligent loading, which is another striking difference between it and the Harter Act.[29]

[25] BUTLER v. BOSTON & S. STEAMSHIP CO., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751; City of Columbus (D. C.) 22 Fed. 460; Amsterdam (D. C.) 23 Fed. 112; Glaholm v. Barker, L. R. 2 Eq. 598; Id., 1 Ch. App. 223.

[26] NORWICH & N. Y. TRANSP. CO. v. WRIGHT, 13 Wall. 104, 20 L. Ed. 585; Great Western, 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. Ed. 156.

[27] Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110; Rochester (D. C.) 230 Fed. 519.

[28] Ante, p. 183.

[29] COLIMA (D. C.) 82 Fed. 665.

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It may be pleaded against any wrongful acts of the master; for example, his wrongful sale of the cargo.[30]

PRIVITY OR KNOWLEDGE OF OWNER

164. In order for the owners to exonerate themselves, the negligent act must have been without their privity or knowledge. This means the personal privity or knowledge of the owners, and not the mere privity or knowledge of their agents; except that in the case of a corporation the privity or knowledge of the president or other high official above the grade of an employé is the privity or knowledge of the corporation, and would defeat the right of the corporation to the exemption.

The question what constitutes privity or knowledge has been the subject of much discussion. It is clear, at the outset, that actual knowledge of the owners would prevent them from claiming the exemption.[31]

Nor can it be claimed against liabilities which the owners have personally contracted; for instance, supplies ordered by them personally.[32]

It can be claimed only against those liabilities incurred as owner, not against contracts outside of the regular functions of the vessel owner. For instance, it has been held that it could not be set up against a vessel owner's contract to insure the goods shipped.[33]

It may be set up even against defects which would be held to constitute unseaworthiness if those defects were not discoverable by the ordinary examination of an unskilled per-

[30] Giles Loring (D. C.) 48 Fed. 463.

§ 164. [31] In re Meyer (D. C.) 74 Fed. 881.

[32] Amos D. Carver (D. C.) 35 Fed. 665; McPhail v. Williams (D. C.) 41 Fed. 61; Gokey v. Fort (D. C.) 44 Fed. 364.

[33] Laverty v. Clausen (D. C.) 40 Fed. 542.

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son. In Quinlan v. Pew [34] the owners had chartered the vessel out to the master. There was a defect in the rigging at the time of the commencement of the voyage which the owners did not know, and which the master did know before she sailed. The owners had employed him to put the vessel in order, and he did not report this defect to them. In consequence of the defect, one of the crew was injured, and the owners attempted to limit their liability by appealing to this statute. This was contested on the ground that they ought to have known of this defect; that it was such a defect as affected the seaworthiness of the vessel, and that, therefore, they should be denied the exemption. The court, however, held that the knowledge of the agent employed by them to make these repairs, and their joint obligation to render the vessel seaworthy, did not make them privy to this defect, and therefore that they were entitled to limit their liability.

In the Warkworth,[35] which arose under the English statute, a collision was caused by a defect in the steering gear of the vessel. The owners had employed a man on shore to inspect the vessel; and, if he had done his duty, the defect could have been discovered. It was held that this fact did not prevent the owners from limiting their liability.

In Lord v. Goodall, N. & P. S. S. Co.,[36] Circuit Judge Sawyer thus discusses the meaning of the words "privity or knowledge":

"As used in the statute, the meaning of the words 'privity or knowledge' evidently is a personal participation of the owner in some fault or act of negligence causing or contributing to the loss, or some personal knowledge or means of

[34] 56 Fed. 111, 5 C. C. A. 438.

[35] 9 P. D. 20; Id., 9 P. D. 145.

[36] 4 Sawy. 292, Fed. Cas. No. 8,506. This case was taken to the Supreme Court, and was affirmed on the question of the constitutionality of the statute. See 102 U. S. 541, 26 L. Ed. 224. The merits do not seem to have come before the Supreme Court.

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knowledge, of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it. There must be some personal concurrence, or some fault or negligence on the part of the owner himself, or in which he personally participates, to constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provisions. Hill Mfg. Co. v. Providence & New York S. S. Co., 113 Mass. 499, 18 Am. Rep. 527. It is the duty of the owner, however, to provide the vessel with a competent master and a competent crew, and to see that the ship, when she sails, is in all respects seaworthy. He is bound to exercise the utmost care in these particulars—such care as the most prudent and careful men exercise in their own matters under similar circumstances; and if, by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity, within the meaning of the act. * * * So, also, if the owner has exercised all proper care in making his ship seaworthy, and yet some secret defect exists, which could not be discovered by the exercise of such due care, and the loss occurs in consequence thereof, without any further knowledge or participation on his part, he is in like manner exonerated, for it cannot be with his 'privity or knowledge,' within the meaning of the act, or in any just sense; and the provision is that 'the liability of the owner * * * for any act, matter or thing, loss, etc., * * * occasioned without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending.' This language is broad, and takes away the quality of warranty implied by the common law against all losses except by the act of God and the public enemy. When the owner is a corporation, the privity or knowledge of the managing officers of the corporation

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must be regarded as the privity and knowledge of the corporation itself."

But if the warranty of seaworthiness springs from an express contract made by the owner personally, and not as a mere implication, the owner cannot defend on the want of privity or knowledge, for he must know what contract he made personally.[87]

The question of the privity or knowledge of a corporation has been the subject of many interesting decisions. The result of these decisions is in substance that knowledge of some defect (even amounting to unseaworthiness) by some agent or employé is not the knowledge of the corporation, so as to defeat its right to the exemption; but the knowledge of the president or other high official of the corporation would be.

In the COLIMA,[88] the vessel was rendered unseaworthy by the method in which her master and crew loaded her, and it was contended that this defeated the corporation owner's right to the exemption. District Judge Brown, however, held that it did not. In his opinion he says:

"I think the petitioner, upon surrender of the freight ($23,846.58), is entitled to the exemption provided by section 4283 of the Revised Statutes, as not being privy to the defects in loading, or in the management of the ship at sea, nor having knowledge of them. Privity and knowledge are chargeable upon a corporation when brought home to its principal officers, or to the superintendent, who is its representative; and, if such privity or knowledge were here brought home to Mr. Schwerin, the petitioner's superintendent, they would be chargeable upon the corporation. But the privity or knowledge referred to in the statute is not that which arises out of the mere relation of principal

[87] Pendleton v. Benner Line, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770.

[88] (D. C.) 82 Fed. 665. See, also, Erie Lighter 108 (D. C.) 250 Fed. 490, 494 (5).

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and agent by legal construction. If it were, the statute would have nothing to operate upon, since the owner does not become liable at all except for the acts of himself or his agent. The object of this statute, however, was to abridge the liability of shipowners arising out of a merely constructive privity with their agent's acts, by introducing the rule of limited liability prevailing in the general maritime law, upon the terms prescribed in the statute, so far at least as respects damages for torts; while the act of 1884 extends this limitation to contracts also, except as to seamen's wages. * * * The knowledge or privity that excludes the operation of the statute must, therefore, be in a measure actual, and not merely constructive; that is, actual through the owner's knowledge, or authorization, or immediate control of the wrongful acts or conditions, or through some kind of personal participation in them. If Mr. Schwerin, the superintendent, had been either charged personally with the duty of directing or managing the distribution of this cargo with reference to the stability of the ship, or had assumed that function, the company would perhaps have been 'privy' to any defects in loading arising from the negligence of workmen under his immediate direction and control, whether he had actual knowledge of their delinquencies or not; since it is the duty of the person in immediate charge and actual control to see and know that proper directions are carried out. However that may be, Mr. Schwerin had no such duty, and assumed no such function. That duty, as the evidence shows, was committed to a competent stevedore, who acted under the immediate direction of the master and first mate, or in conjunction with them. The master and mate were the proper persons to determine and insure the necessary trim and stability of the ship, and are supposed to be specially qualified to do so. Lawrence v. Minturn, 17 How. 100, 111, 116, 15 L. Ed. 58. Whatever mistakes or negligence may have occurred in that work, there is no evidence that Mr. Schwer-

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in knew of them; nor would they naturally have come to his knowledge; and I do not see the least reason to doubt his testimony that he believed that the ship was properly loaded, and perfectly seaworthy. The deck load was no indication to the contrary, because deck loads were customary, and safe with proper loading below."

In the Annie Faxon,[89] an injury happened from an explosion of the boiler. It appeared that the corporation owning the vessel had left the duty of inspecting this boiler to a competent marine engineer, and that the defect which caused the injury would not have been apparent to an unskilled person. It was held that the negligence of this employé to inspect the boiler properly was not such privity or knowledge of the corporation as defeated its right to the exemption. In the opinion Gilbert, J., says:

"We are unable to perceive how there can be imputation of privity or knowledge to a corporation of defects in one of its vessel's boilers, unless the defects were apparent, and of such a character as to be detected by the inspection of an unskilled person. The record fails to show that the defects were of this character. The testimony fairly sustains the finding of the court that the defects in the boiler were not patent, and that they could have been discovered only by applying the proper tests after the repairs of June, 1893. The test was not applied, and in that omission is one of the elements of the negligence of the petitioners, as found by the court. When we consider the purpose of the law which is under consideration, and the construction that has been given to it by the courts, it is obvious that the managers of a corporation whose business is the navigation of vessels are not required to have the skill and knowledge which are demanded of an inspector of a boiler. It is sufficient if the corporation employ, in good faith, a competent person to make such inspection. When it has employed

[89] 75 Fed. 312, 21 C. C. A. 366. See, also, Harry Hudson Smith, 142 Fed. 724, 74 C. C. A. 56.

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such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases, so far as concerns injuries from defects of which it has no knowledge, and which are not apparent to the ordinary observer, but which require for their detection the skill of an expert."

It was held, however, in this same case, that the requirement of section 4493 of the Revised Statutes (U. S. Comp. St. § 8269), making exceptions in favor of passengers on vessels, was not affected by the limited liability act, it being an entirely different statute, which, when considered in pari materia with the limited liability act, might be considered an exception to it.

In Craig v. Continental Ins. Co.,[40] the injury arose from the negligence of an employé of the insurance company to which the vessel had been abandoned. The employé was attempting to bring her to port in a disabled condition. The court held that his negligence was not the privity or knowledge of the insurance company, which owned her by virtue of the abandonment, and that they could claim the limitation of liability.

The habitual disregard of the rule against immoderate speed in a fog by the navigators of a ship does not deprive the owner of the right to a limitation unless knowledge of such practice is brought home to him.[41]

The failure of the captain of a ship to follow the directions of his Government in time of war does not defeat the owner's right to a limitation.[42]

On the other hand, in the Republic,[43] a barge belonging to a corporation was being used for an excursion, and while

[40] 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886.

[41] Deslions v. La Compagnie Générale Transatlantique, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., 197 Fed. 703, 117 C. C. A. 97.

[42] Lusitania (D. C.) 251 Fed. 715.

[43] 61 Fed. 109, 9 C. C. A. 386.

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in such use, with many passengers aboard, was injured by a thunderstorm of no extraordinary severity. The barge had been inspected by the president of the corporation, and its unsafe condition was apparent. The court held that his knowledge was the knowledge of the corporation, and that they could not plead the statute in defense under such circumstances.

A superintendent with general control and management of a company's business is an official of such grade that his knowledge is the knowledge of the corporation.[44]

THE VOYAGE AS THE UNIT

165. The end of the voyage is the time as of which the exemption can be claimed, the voyage being taken as the unit. If the voyage is broken up by a disaster—as, for example, when the vessel is totally lost—that is taken as the time.

It can readily be understood that the act does not intend to permit the owners an exemption for an indefinite period prior to the accident. As the act of 1884 extended the right of exemption to debts as well as torts, the hardship of such a construction would be patent. Hence the courts have taken the voyage as the unit, and permitted the owner to protect himself simply against the liabilities of the voyage. This may be difficult to apply in many cases, and, in fact, in the case of boats which make very short voyages, may greatly curtail the benefit of the act to the owner; but that is settled as the test.

In the CITY OF NORWICH,[45] this was laid down as the rule by the United States Supreme Court. There the vessel was destroyed by an accident.

[44] Erie Lighter 108 (D. C.) 250 Fed. 490; Eastern S. S. Corporation v. Great Lakes Dredge & Dock Co. (C. C. A.) 256 Fed. 497.

§ 165. [45] 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134. See, also, Americana (D. C.) 230 Fed. 853.

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In the Great Western,[46] the vessel had one accident, and, proceeding on her voyage, had a second accident, entirely disconnected with the first—the result of the second accident being the wreck of the vessel. The court held that the termination of the voyage was the second accident, and that the owners could limit their liability for everything up to that point on that voyage.[47]

This means the straight voyage, not the round trip.[48]

EXTENT OF LIABILITY OF PART OWNERS

166. The part owners are liable each to the extent of their proportionate interest in the vessel, except that a part owner personally liable cannot claim the exemption at all.[49]

MEASURE OF LIABILITY—TIME OF ESTIMATING VALUES

167. The value of the vessel and pending freight is taken just after the accident, or end of the voyage, if the voyage is not broken up by the accident.

This is laid down by the Supreme Court in the case of the SCOTLAND,[50] and marks a material difference between the American and English act. Our act fixes the value of the vessel just after the accident, so that, if she is totally lost, the liability of the owner is practically nothing. The English act, on the other hand, takes a tonnage

[46] 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. Ed. 156.

[47] See, also, Gokey v. Fort (D. C.) 44 Fed. 364; Geo. L. Garlick, 107 Fed. 542, 46 C. C. A. 456.

[48] Deslions v. La Compagnie Générale Transatlantique, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973.

§ 166. [49] Whitcomb v. Emerson (D. C.) 50 Fed. 128; Giles Loring (D. C.) 48 Fed. 463.

§ 167. [50] 105 U. S. 24, 26 L. Ed. 1001.

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valuation just before the accident, so that, in case of total loss, under the English act the owner must make up to the creditors of the vessel substantially the value of the vessel uninjured.

In the CITY OF NORWICH,[51] it is settled as the law of this country that the value is taken as of the end of the voyage, if not lost, but at the accident if the vessel is totally lost, and the voyage thereby broken up. Hence, if a vessel is partially injured, and subsequently raised and repaired, the owners can have the cost of raising and repairing taken into consideration, and receive credit for them in the valuation of the vessel.

The voyage itself may be rather an indefinite expression. For instance, it has been held in the case of a vessel used during a fishing season that the entire fishing season ought to be treated as one voyage, and that, therefore, the owners must account for the entire season's earnings in order to obtain the benefit of the limitation.[52]

SAME—PRIOR LIENS

168. The res must be surrendered clear of prior liens.

In fixing the value, the owner must account for the value of the res, clear of all liens or claims prior to the voyage.

The res, in the sense of this statute, may consist of more than one vessel. In the Bordentown,[53] several tugs belonging to the same owner were towing a large tow of many barges. After the towage commenced, one of the tugs was detached, but the two remaining tugs were guilty of an act of negligence, causing great loss. The court held

[51] 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134. See, also, Abbie C. Stubbs (D. C.) 28 Fed. 719; Mauch Chunk (D. C.) 139 Fed. 747; Id., 154 Fed. 182, 83 C. C. A. 276.

[52] Whitcomb v. Emerson (D. C.) 50 Fed. 128.

§ 168. [53] (D. C.) 40 Fed. 682.

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that the owner, in order to claim the benefit of the statute, must surrender the two tugs that participated in the negligent act, but not the one which had been detached before the act occurred.

In the Columbia,[54] a barge without means of propulsion was being towed by a tug, and a large quantity of freight was on the barge. When exemption was claimed against an accident, including large claims of personal injury, it was held that the owner was required to surrender both the tug and the barge.

The rule is that the vessels at fault must be surrendered, not those who are innocent instruments. For instance, in case of tug and tow, the question whether tug or tow should be surrendered would depend on the question which was liable, neither being responsible for the acts of the other.[55]

As stated above, the owner must also surrender the vessel clear of prior liens. If this were not so, he might, by mortgaging the vessel to her value, withdraw all funds from the creditors of the boat. Accordingly, in the Leonard Richards,[56] the court says:

"The first question suggested by counsel for the owners of the tug is as to the proper construction to be put upon the words 'value of the interest of the owner,' as used in the limited liability act. The section of the act in point, or so much of it as is necessary to quote, is as follows: 'The liability of the owner of any vessel, * * * for any loss, damage, or injury by collision, * * * done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of

[54] 73 Fed. 226, 19 C. C. A. 436.

[55] Eugene F. Moran v. New York Cent. & H. R. R. Co., 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600; Transfer No. 21, 248 Fed. 459, 160 C. C. A. 469; Erie Lighter 108 (D. C.) 250 Fed. 490; O'Brien Bros. (D. C.) 252 Fed. 185.

[56] (D. C.) 41 Fed. 818. See, also, Gokey v. Fort (D. C.) 44 Fed. 364.

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the interest of such owner in such vessel, and her freight then pending.' Rev. St. U. S. § 4283. It appears in this case that supplies to a large amount had been furnished to this tug, which were at the time of the collision unpaid for, and which, under the law, were liens upon the vessel; and the insistment of counsel was that although the tug had an apparent value of $8,000, and had been appraised at that sum, yet the 'interest of the owner' in her ought not to be calculated upon that basis, but that from the appraised value of the vessel should be deducted the full amount of the debts and claims owed by the vessel, and the balance taken to be the true 'value of the interest' of the owner. In other words, that, while the stipulation filed, and upon which the tug was released from the custody of the officers and returned to her owner, was for $8,000, yet when the time came for payment of the sum into court in compliance with its condition, to be distributed among libelants and claimants according to law, there should be first deducted therefrom a sum equal to the full amount of all debts due for supplies, repairs, etc., for which liens against the vessel could be enforced, and the balance only brought here as the true value of the owner's interest, to be distributed pro rata among the libelants. Without considering whether the owner is not, by his own act, estopped from raising this question now, after entering into a stipulation to pay the full amount of the appraised value of the tug if she be found in fault to the other libelants, and in consideration thereof receiving security from the law from all further or greater liability, I am clearly of opinion that the real value of the vessel in fault, without regard to liens upon her at the termination of her voyage, upon which she negligently caused the injury complained of, measures justly and equitably the value of the interest of the owner therein as contemplated by the limited liability act."

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SAME—DAMAGES RECOVERED FROM OTHER VESSEL

169. The owner must also surrender damages recovered from another vessel.

If the owner has proceeded against another vessel, and recovered damages for the injury to his vessel in the accident against which he is claiming liability, he must surrender these damages also; they being considered the representative of his vessel. This was held in O'Brien v. Miller.[57] In delivering the opinion of the court, Mr. Justice White says:

"The clear purpose of Congress was to require the shipowner, in order to be able to claim the benefit of the limited liability act, to surrender to the creditors of the ship all rights of action which were directly representative of the ship and freight. Where a vessel has been wrongfully taken from the custody of her owners, or destroyed through the fault of another, there exists in the owner a right to require the restoration of his property, either in specie or by a money payment, as compensation for a failure to restore the property. Manifestly, if the option was afforded the owner of the ship to receive back his property or its value, he could not, by electing to take its value, refuse to surrender the amount as a condition to obtaining the benefit of the act. * * * Indeed, that a right of action for the value of the owner's interest in a ship and freight is to be considered as a substitute for the ship itself, was decided in this court in the case of Sheppard v. Taylor, 5 Pet. 675, 8 L. Ed. 269. * * * Mr. Justice Story, delivering the opinion of the court, said (page 710, 5 Pet., and page 282, 8 L. Ed.): 'If the ship had been specifically restored, there is

§ 169. [57] 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469. See, also, St. Johns (D. C.) 101 Fed. 469.

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no doubt that the seamen might have proceeded against it in the admiralty in a suit in rem for the whole compensation due to them. They have, by the maritime law, an indisputable lien to this extent. This lien is so sacred and indelible that it has on more than one occasion been expressively said that it adheres to the last plank of the ship. Relf v. The Maria, 1 Pet. Adm. 186, 195, note, Fed. Cas. No. 11,692; The Sydney Cove, 2 Dod. 13; The Neptune, 1 Hagg. Ad. 227, 239. And, in our opinion, there is no difference between the case of a restitution in specie of the ship itself and a restitution in value. The lien reattaches to the thing, and to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of courts of common law and equity. The owner and the lienholder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them. In respect, therefore, to the proceeds of the ship, we have no difficulty in affirming that the lien in this case attaches to them.' Nor does the ruling in the CITY OF NORWICH, supra, that the proceeds of an insurance policy need not be surrendered by the shipowner, conflict with the decision in Sheppard v. Taylor. The decision as to insurance was placed on the ground that the insurance was a distinct and collateral contract, which the shipowner was at liberty to make or not, On such question there was division of opinion among the writers on maritime law and in the various maritime codes. But, as shown by the full review of the authorities found in the opinion of the court and in the dissent in the CITY OF NORWICH, all the maritime writers and codes accord in the conclusion that a surrender, under the right to limit liability, must be made of a sum received by the owner as the direct result of the loss of the ship, and which is the legal equivalent and substitute for the ship. We conclude that the owner who retains the sum of the damages which have been awarded him for the loss of his ship and freight has not

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surrendered 'the amount or value' (section 4283, Rev. St. U. S.) of his interest in the ship; that he has not given up the 'whole value of the vessel' (section 4284); that he has not transferred 'his interest in such vessel and freight' (section 4285). It follows that the shipowner, therefore, in the case before us, to the extent of the damages paid on account of the collision, was liable to the creditors of the ship, and the libelants, as such creditors, were entitled to collect their claim, it being less in amount than the sum of such proceeds."

SAME—FREIGHT

170. Pending freight must be surrendered.

The owner is also required to surrender pending freight. This has been held to include demurrage, and prepaid fare of passengers.[58]

If any freight has been earned or prepaid during the voyage, the owner must account for it; but, if the voyage is broken up, so that no freight is actually earned, then he cannot be made to pay it.[59]

The freight to be surrendered is the gross freight for the voyage.[60]

If the vessel owner is carrying his own goods, he must account for a fair freight for them.[61]

A government subsidy is not freight, and need not be surrendered.[62]

§ 170. [58] Giles Loring (D. C.) 48 Fed. 463; Main, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381. As to the meaning of freight, see ante, p. 155, § 72.

[59] CITY OF NORWICH, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

[60] Abbie C. Stubbs (D. C.) 28 Fed. 719.

[61] Allen v. Mackay, 1 Spr. 219, Fed. Cas. No. 228.

[62] Deslions v. La Compagnie Générale Transatlantique, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973.

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SAME—SALVAGE AND INSURANCE

171. Salvage and insurance need not be surrendered, neither being an interest in the vessel or freight.

But the owner is not required to account for salvage earned during the voyage.[63]

And, if he has taken out insurance, he is not required to account for the insurance money collected by him; that being a collateral undertaking, and not an interest in the vessel. On this subject Mr. Justice Bradley says in the CITY OF NORWICH.[64]

"The next question to be considered is whether the petitioners were bound to account for the insurance money received by them for the loss of the steamer, as a part of their interest in the same. The statute (section 4283) declares that the liability of the owner shall not exceed the amount or value of his interest in the vessel and her freight; and section 4285 declares that it shall be a sufficient compliance with the law if he shall transfer his interest in such vessel and freight, for the benefit of claimants, to a trustee. Is insurance an interest in the vessel or freight insured, within the meaning of the law? That is the precise question before us.

"It seems to us, at first view, that the learned justice who decided the case below was right in holding that the word 'interest' was intended to refer to the extent or amount of ownership which the party had in the vessel, such as his aliquot share, if he was only a part owner, or his contingent interest, if that was the character of his ownership. He might be absolute owner of the whole ship, or he might own but a small fractional part of her, or he might have a tem-

§ 171. [63] In re Meyer (D. C.) 74 Fed. 881.

[64] 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134. See, also, Pere Marquette 18 (D. C.) 203 Fed. 127.

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porary or contingent ownership of some kind, or to some extent. Whatever the extent or character of his ownership might be—that is to say, whatever his interest in the ship might be—the amount or value of that interest was to be the measure of his liability.

"This view is corroborated by reference to a rule of law which we suppose to be perfectly well settled, namely, that the insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured, guarantying him against loss of the property by fire or other specified casualty, but not conferring upon him any interest in the property. That interest he has already, by virtue of his ownership. If it were not for a rule of public policy against wagers, requiring insurance to be for indemnity merely, he could just as well take out insurance on another's property as on his own; and it is manifest that this would give him no interest in the property. He would have an interest in the event of its destruction or nondestruction, but no interest in the property. A man's interest in property insured is so distinct from the insurance that, unless he has such an interest independent of the insurance, his policy will be void."

PROCEDURE—TIME FOR TAKING ADVANTAGE OF STATUTE

172. The owner may take advantage of the statute at any time before he is actually compelled to pay the money.

Under the American practice, he may contest his liability for any damages at all, fight that through all the courts, and, if finally defeated, take advantage of the statute.[65]

§ 172. [65] BENEFACTOR, 103 U. S. 239, 26 L. Ed. 351; S. A. McCaulley (D. C.) 99 Fed. 302.

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He does not lose his right by giving bond in the original suit, either in the trial court or the appellate court, or by failure to have an appraisal or otherwise follow strictly the procedure prescribed.[66]

SAME—DEFENSE TO SUIT AGAINST OWNER, OR INDEPENDENT PROCEEDING

173. The statute may be set up either by defense to a suit brought against the owner, or by an independent proceeding under the federal admiralty rules.

If it is desired to defend against one claim, the simplest method is by answer or plea in the suit asserting that claim against the owner. Hence it is settled that this is a proper mode of taking advantage of the statute, and it may be invoked either in the federal or state courts.[67]

Where the claims are many, and it is desired to convene them all in one proceeding, the usual method is by petition in the federal court. The procedure on these petitions is regulated by admiralty rules 54–58.[68]

Such a petition may be filed, though but one claim is being asserted against the ship or owner.[69]

It may be filed before any suit is brought at all against the owner.[70]

[66] Rochester (D. C.) 230 Fed. 519; T. W. Wellington (D. C.) 235 Fed. 728; Ethelstan (D. C.) 246 Fed. 187.

§ 173. [67] SCOTLAND, 105 U. S. 24, 26 L. Ed. 1001; Great Western, 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. Ed. 156; Loughin v. McCaulley, 186 Pa. 517, 40 Atl. 1020, 48 L. R. A. 33, 65 Am. St. Rep. 872.

[68] As this treatise is on admiralty jurisdiction, and can only cursorily allude to procedure, the discussion of procedure on this act will necessarily be very brief. The reader is referred to the excellent treatise of Mr. Benedict on Admiralty for further details of procedure.

[69] White v. Island Transp. Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993; Strong v. Holmes, 238 Fed. 554, 151 C. C. A. 490.

[70] Ex parte Slayton, 105 U. S. 451, 26 L. Ed. 1066.

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If suits are pending against the owner in other jurisdictions, the proceeding in the admiralty court is exclusive; and litigants in the other courts may be enjoined from litigating further in those courts, and may be compelled to come into the admiralty court. This is one of the cases in which injunctions to proceedings in state courts are not forbidden by section 720 of the Revised Statutes.[71]

METHOD OF DISTRIBUTION

174. Under the express provisions of the statute, all claims filed, whether they have an admiralty lien attached or are mere personal claims against the owner, are paid pro rata.[72]

This pro rata rule applies simply to the claims on the voyage, which, as seen above, is taken as the unit. Questions of priority as between those claims and claims on other voyages cannot well arise in the proceeding; for it has been seen that, when the owner seeks the benefit of the statute, he must surrender the res clear of all prior liens or claims against it. Hence, under this procedure, the court has in its possession an unincumbered res, and divides that pro rata among those who have suffered on that special voyage, regardless of the marshaling of other claims which would take place if no proceeding for limitation of liability was pending.

[71] U. S. Comp. St. § 1242; PROVIDENCE & N. Y. S. S. CO. v. HILL MFG. CO., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; In re Whitelaw (D. C.) 71 Fed. 733, 735; San Pedro, 223 U. S. 365, 32 Sup. Ct. 275, 56 L. Ed. 473, Ann. Cas. 1913D, 1221 (holding also that an injunction is not necessary, and that the proceeding itself has the effect of a statutory injunction).

§ 174. [72] Butler v. Boston & S. S. S. Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; Maria & Elizabeth (D. C.) 12 Fed. 627; Catskill (D. C.) 95 Fed. 700; St. Johns (D. C.) 101 Fed. 469; Glaholm v. Barker, L. R. 2 Eq. 598; Id., 1 Ch. App. 223; Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., 197 Fed. 703, 117 C. C. A. 97.

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CHAPTER XVII

OF THE RELATIVE PRIORITIES OF MARITIME LIENS AS AMONG EACH OTHER AND ALSO AS BETWEEN THEM AND NONMARITIME LIENS OR TITLES *

175. Relative Rank as Affected by Nature of Claims.
176–177. Contract Liens in General.
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RELATIVE RANK AS AFFECTED BY NATURE OF CLAIMS

175. The order in which liens are paid depends upon four contingencies:

(a) Their relative merit.

(b) The time at which the lien vested.

(c) The date at which proceedings are commenced for its enforcement.

(d) The date of the decree.

The relative rank of maritime liens is the subject of much conflicting decision, from which it is impossible to extract any inflexible general rule. While there are elementary

*Modified by Merchant Marine Act approved June 5, 1920, passed too late for discussion.

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principles underlying the doctrine, they may be affected at any time by special equities or circumstances superseding the general principles, and forming an exception to them. On this subject, Judge Brown, when District Judge of the Eastern District of Michigan, said in the CITY OF TAWAS:[1]

"The subject of marshaling liens in admiralty is one which, unfortunately, is left in great obscurity by the authorities. Many of the rules deduced from the English cases seem inapplicable here. So, also, the principles applied where the contest is between two or three libelants would result in great confusion in cases where 50 or 60 libels are filed against the same vessel. The American authorities, too, are by no means harmonious, and it is scarcely too much to say that each court is a law unto itself."

This marshaling of liens, being intended to work justice among the lienors, should not be so applied as to work injury to third parties.[2]

SAME—CONTRACT LIENS IN GENERAL

176. These must first be considered in reference to their general nature, as there is supposed to be an inherent merit in certain ones over others, in the absence of special equities arising from the comparative dates of their service and other considerations.

177. Among contract liens in general the order of rank may be stated:

(a) Seamen's wages.
(b) Salvage.
(c) Materials, supplies, advances, towage, pilotage, and general average.
(d) Bottomry.
(e) Nonmaritime liens and titles.

§ 175. [1] (D. C.) 3 Fed. 170.
[2] Chioggia, [1898] P. 1.

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SAME—SEAMEN'S WAGES

178. It is a favorite principle of the admiralty that seamen's wages are of the highest rank and dignity, adhering to the last plank of a ship, and ranking all other contract liens of the same relative dates.

In the Virgo,[3] District Judge Benedict, in passing upon their rank as compared to salvage and other supplies, held them to rank even supplies furnished after the vessel was brought into port and after the wages had accrued, as the supplies were of a nature that did not add anything to the value of the vessel, and as the time was so short that the seamen could hardly have been responsible for not proceeding more promptly. In the opinion he says:

"I am of the opinion, therefore, that the wages of the seamen, which are nailed to the last plank of the ship, and which under no circumstances contributed to the general average, as well as the salvage demand, are entitled to priority in payment over the demands of the other libelants, no one of whom, it will be observed, in any degree added by their services to the value of the vessel, or in the slightest degree increased the fund realized from her sale. It is a case of some hardship to the materialmen, no doubt, but no greater than in the ordinary case where the vessel proves insufficient in value to pay her bills. The hardship in this case arises, not from any fault on the part of the salvors or the seamen, but from the fact that the materialmen furnished what they did to a vessel so largely incumbered by liens superior in grade to their demands."

In the Paragon,[4] Judge Ware said:

"Among privileged debts against a vessel, after the expenses of justice necessary to procure a condemnation and

§ 178. [3] (D. C.) 46 Fed. 294.
[4] 1 Ware, 326, Fed. Cas. No. 10,708.

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sale, and such charges as accrue for the preservation of the vessel after she is brought into port (1 Valin, Comm. 362; Code Commer. No. 191), the wages of the crew hold the first rank, and are to be first paid. And so sacred is this privilege held that the old ordinances say that the savings of the wreck, are to the last nail, pledged for their payment. Consulat de la Mer, c. 138; Cleirac sur Jugemens d'Oleron, art. 8, note 31. And this preference is allowed the seamen for their wages independently of the commercial policy of rewarding their exertions in saving the ship, and thus giving them an interest in its preservation. The priority of their privilege stands upon a general principle affecting all privileged debts; that is, among these creditors he shall be preferred who has contributed most immediately to the preservation of the thing. 2 Valin, Comm. 12, liv. 3, tit. 5, art. 10. It is upon this principle that the last bottomry bond is preferred to those of older date, and that repairs and supplies furnished a vessel in her last voyage take precedence of those furnished in a prior voyage, and that the wages of the crew are preferred to all other claims, because it is by their labors that the common pledge of all these debts has been preserved, and brought to a place of safety. To all the creditors they may say, 'Salvam fecimus totius pignoris causam.' The French law (Ord. de la Mer. liv. 1, tit. 14, art. 16; Code Commer. 191) confines the priority of the seamen for their wages to those due for the last voyage, in conformity with the general rule applicable to privileged debts; that is, that the last services which contribute to the preservation of the thing shall be first paid. But this restriction is inapplicable to the engagements of seamen in short coasting voyages, which are not entered into for any determinate voyage, but are either indefinite as to the terms of the engagement, and are determined by the pleasure of the parties, or are for some limited period of time."

Wages for a voyage have been also held to rank a bottomry bond executed for the necessities of that very voyage,

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because, but for the efforts of the seamen, the vessel would not have reached port, and the bottomry bondholder would have had nothing to hold for his claim.[5]

If they rank subsequent materials under the circumstances just explained, a fortiori they rank materials and supplies practically concurrent with them.[6]

They also rank salvage, and damage claims incurred on a previous voyage, under the principle, which we have seen running through the admiralty law, that the prior lienholders have a jus in re or a proprietary interest in the ship itself, and that efforts tending to the preservation of the res are incurred for their benefit.[7]

SAME—SALVAGE

179. Salvage may rank any prior lien for which it saves the res.

It may not be entirely accurate to put salvage behind even seamen's wages, when we consider its nature.

The salvor ranks seamen's wages incurred prior to the salvage services, upon this same principle that it tends to the preservation of the res, without which the seamen themselves might lose their security.[8]

In the leading case of the FORT WAYNE,[9] the court, discussing this question, and deciding that salvage was ahead of prior seamen's wages, says:

"It may be remarked here that it does not admit of doubt, nor is it controverted in this case, that, if there had been a salvage service rendered by the wrecking company within

[5] DORA (C. C.) 34 Fed. 348; Irma, 6 Ben. 1, Fed. Cas. No. 7,064.
[6] Saylor v. Taylor, 23 C. C. A. 343, 77 Fed. 476.
[7] Lillie Laurie (C. C.) 50 Fed. 219.

§ 179. [8] Selina, 2 Notes Cas. Ad. & Ec. 18; Athenian (D. C.) 3 Fed. 248.
[9] 1 Bond, 476, Fed. Cas. No. 3,012.

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the meaning of the maritime law, it imports a lien in their favor which has priority over claims for wages earned, or supplies furnished, before the sinking of the boat. This is well-established law, and has its basis in obvious principles of justice and reason. Meritorious salvors stand in the front rank of privilege, and the rights of those having liens before the salvage service must be secondary to those having a salvage claim. This principle is well stated in Coote's Admiralty Practice. The author says (page 116): 'The suitor in salvage is highly favored in law, on the assumption that, without his assistance, the res might have been wholly lost. The service is, therefore, beneficial to all parties having either an interest in or a claim to the ship and her freight and cargo.' And again (page 117), it is laid down that 'salvage is privileged before the original or prior wages of the ship's crew, on the ground that they are saved to them as much as, or eadem ratione qua, the ship is saved to the owners.' This doctrine is so well settled, both by the English and American authorities, that it is useless to multiply citations."

For the same reason salvage is superior in dignity to materials and supplies.[10]

It is also ahead of the cargo's claim for general average arising out of a jettison on the voyage when the vessel was subsequently wrecked, since the salvor saved the only property against which the claim for general average could be asserted.[11]

Judge Longyear, in delivering the opinion, says:

"It was conceded on the argument, and such is undoubtedly the law, that the lien for salvage takes precedence of the lien for general average. The libel of the insurance companies in this case is in terms for general average, and I can see nothing in the circumstances of the case to war-

[10] M. Vandercook (D. C.) 24 Fed. 472; Virgo (D. C.) 46 Fed. 294; Lillie Laurie (C. C.) 50 Fed. 219.

[11] Spaulding, 1 Brown, Ad. 310, Fed. Cas. No. 13,215.

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rant the court in holding it to be anything else, even if the libel had been otherwise. Without the salvage services, the whole was a loss. With the salvage services, the loss is reduced to a part only. In the former case there would have been nothing left upon which a lien for general average could attach. In the latter case it has something upon which it may attach, solely because of the salvage services; and it would be not only contrary to the general rule of law above stated, but unjust and inequitable, to place such lien as to the part thus saved upon the same footing, as to precedence, as the lien for the salvage services."

SAME—MATERIALS, SUPPLIES, ADVANCES, TOWAGE, PILOTAGE, AND GENERAL AVERAGE

180. Materials, supplies, advances, towage, pilotage, and general average are, in the absence of special circumstances, equal in dignity.

These may be considered as of the same relative rank, in the absence of special circumstances or equities.

For some time there was quite a conflict in the decisions on the question whether the liens of materialmen arising out of a state statute were equal in dignity to those arising under the general admiralty law. On principle there is no sound reason for any such distinction. The only reason why these state statutes are given force at all is that the subject-matter is maritime in its nature, and that the statutes merely superadd the remedy in rem. If marine in its nature, it ought to be marine in its rights. The state statute adds nothing to its dignity or to its character. It merely changes a presumption of credit. Hence the later authorities have settled that foreign and domestic liens of material men rank alike.[12]

§ 180. [12] Guiding Star (D. C.) 9 Fed. 521; Id. (C. C.) 18 Fed. 264; Wyoming (D. C.) 35 Fed. 548. This question is unimportant

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Claims of this nature also rank a prior bottomry. In the Jerusalem,[13] Mr. Justice Story gives the reason for this. He says:

"If, then, the repairs in this case were a lien on the ship, it remains to consider whether they constitute a privileged lien, entitled to a preference over a bottomry interest; for the proceeds now in court are insufficient to answer both claims. In point of time the bottomry interest first attached, and the right became absolute by a completion of the voyage before the repairs were made. Upon general principles, then, the rule would seem to apply, 'Qui prior est tempore, potior est jure.' But it is to be considered that the repairs were indispensable for the security of the ship, and actually increased her value. They are, therefore, not like a dry lien by way of mortgage, or other collateral title. The case is more analogous to that of a second bottomry bond, or the lien of seamen's wages, which have always been held to have a priority of claim, although posterior in time, to the first bottomry bond. Let a decree be entered for payment of the sum claimed by the petitioner out of the proceeds of the sale."

In the Felice B.,[14] Judge Benedict gave preference, under similar circumstances, because the repairs went into the ship, and tended to increase her value, and to enhance to that extent the price which she brought at auction; and he therefore thought it inequitable that the bottomry bondholder should claim this increment, which was not in existence when he loaned his money.

As to the relative rank of claims for unpaid towage and claims of materialmen, there is no reason for any distinc-

now, as the liens both of foreign and domestic materialmen are regulated by the act of Congress of June 23, 1910 (36 Stat. 604, U. S. Comp. St. §§ 7783–7787).

[13] 2 Gall. 345, Fed. Cas. No. 7,294.

[14] (D. C.) 40 Fed. 653. See, also, Aina (D. C.) 40 Fed. 269.

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tion between them, in the absence of special equities, and the courts put them upon the same basis.[15]

But in the Mystic,[16] Judge Blodgett seemed to look upon tugboat men with special favor. The case arose in the city of Chicago, where the ordinances required vessels to use tugs, and where, on account of the narrow and crowded channels, it is a physical impossibility for sail vessels to reach their destination without tugs. Under these special circumstances he held that the value of the towage service was about equal to that of the seamen, as the tug was doing seamen's work, and he placed the tow bills immediately after the seamen's wages, and ahead of domestic supply claims.

In England claims for necessaries on domestic ships do not rank as maritime liens, their act of Parliament being held to give a mere right of arrest.[17]

SAME—BOTTOMRY

181. Bottomry ranks low among maritime liens, as the lender is paid for the risk he runs by a high rate of interest.

Among bottomry bonds on the same voyage, though the dates may be slightly different, there is no priority.[18] But the bottomry bondholder is relegated to the background when he comes in competition with seamen's wages, salvage, materials, or a claim for general average arising on

[15] Saylor v. Taylor, 23 C. C. A. 343, 77 Fed. 476; Sea Witch, 3 Woods, 75, Fed. Cas. No. 11,289.

[16] (D. C.) 30 Fed. 73. In the Olga (D. C.) 32 Fed. 329, Judge Brown, of New York, classified towage service taken necessarily and as part of a pilotage service in the same way; but he carefully distinguished this from ordinary towage.

[17] Mayer's Admiralty Jur. & Pr. 25, 47, 51; Sara, 14 A. C. 209.

§ 181. [18] DORA (D. C.) 34 Fed. 343.

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the same voyage.[19] The reason is that he stands in the shoes of the owner, and has, as heretofore explained, a proprietary interest in the ship, which estops him from questioning the priority of maritime liens to supply her, or to render her more valuable. In addition, he can charge a premium on the ship at a high rate of interest. He therefore becomes practically an insurer against perils of the sea, and, when they arise, he cannot be heard to complain that those who labored to rescue the vessel from them should be preferred in the distribution. Accordingly, these claims for general average arising on the voyage, and the claims of the agents at the port of destination for putting the ship in better shape, are preferred to a bottomry bond. On this point Judge Billings says in the Dora:[20]

"Whoever lends money upon a bottomry obligation for the ordinary transactions of her voyage has a lien upon the vessel which outranks all lien holders save the mariners for their wages. But where maritime services or sacrifices or expenditures are rendered necessary which carry with them maritime liens, the holder of the bottomry bond, like any other mortgagee or pledgee, has his conditional interest burdened precisely as if he were to that extent an owner. Indeed, the bottomry holder can be no more than absolute owner, so far as third persons are concerned. To hold any more restricted doctrine would prejudice the interests of the bottomry holder himself. It is for his interest, as well as for that of all other absolute or conditional owners, that the whole should be saved by a sacrifice of a part, and that the whole thus saved should contribute to make good the sacrifice, and that salvors and all others who render benefits which save or render available the bottom pledged to him should have a lien upon that bottom, even against him. See Williams & B. Adm. Jur. 64, 65, and Macl. Shipp. 702–705. I think that, upon reason and authority, the general average

[19] Id.

[20] See, also, ALINE, 1 W. Rob. Ad. 112.

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should be paid before the bottomry bonds. The transactions out of which the general average arose were subsequent to these bonds, and aided in providing and making available the bottom which these bonds contingently represented."

SAME—NONMARITIME LIENS AND TITLES

182. Nonmaritime liens and titles rank below maritime liens.

The mortgagee is worse off than any, for his claim is not marine. He claims through the owner, from whom he is only one step removed, and accordingly all marine claims are preferred to his debt; and recording it under section 4192 of the Revised Statutes (U. S. Comp. St. § 7778) does not affect this principle.[21]

A maritime lien is not displaced by a sale to an innocent purchaser, in the absence of laches in its enforcement, nor by a common-law reservation of title.[22]

The possessory lien of a shipwright will be recognized when a ship is seized under admiralty process. If the work is of a nature that would create a maritime lien, it will be treated as such. If not, it will be classified as a common-law lien, and protected in the distribution of the remnants after the satisfaction of maritime liens.[23]

§ 182. [21] J. E. RUMBELL, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345. The mortgagee has the same right as the owner through whom he claims to intervene and defend against liens asserted to be prior, and to claim the remnants after the maritime liens are satisfied. Conveyor (D. C.) 147 Fed. 586; Rupert City (D. C.) 213 Fed. 263.

[22] San Raphael, 141 Fed. 270, 72 C. C. A. 388; Hope (D. C.) 191 Fed. 243.

[23] Ulrica (D. C.) 224 Fed. 140; John J. Freitus (D. C.) 252 Fed. 876.

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SAME—TORT LIENS

183. These claims, whether for pure torts or torts where there are also contract relations, rank prior contract liens, and probably subsequent contract liens, where the contract claimant has an additional remedy against the owner.

These claims, as a general rule, rank prior contract claims. The leading case on this subject is the JOHN G. STEVENS.[24] Mr. Justice Gray, in delivering the opinion of the court in that case, says:

"The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege—jus in re—a proprietary interest in the offending ship, and which, when enforced by admiralty process in rem, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done. The owner of the injured vessel is entitled to proceed in rem against the offender, without regard to the question who may be her owners, or to the division, the nature, or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests existing at the time of the collision in the offending vessel, whether by way of part ownership, of mortgage, of bottomry bond, or of other maritime lien for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privi-

§ 183. [24] 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969. See, also, Escanaba (D. C.) 96 Fed. 252; Veritas, [1901] P. 304.

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lege in the vessel herself, was, as was said in the Bold Buccleugh, before cited, of the holder of an earlier bottomry bond, under the law of England, 'so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim.' 1 Moore, P. C. 285."

This reasoning is a necessary deduction from the doctrine, that an admiralty claimant has not merely a right to arrest a vessel, but a proprietary interest in the vessel itself—a jus in re. Consequently, any contract claimant who permits the vessel against which he has a claim to be navigated assumes the risks of navigation to that extent, and holds her out to the world as liable to those with whom she is brought into relations even involuntarily on their part. The only question directly decided in this case was that a claim for damages from negligent towage ranked a prior claim for materials and supplies. The questions as to all other contracts were carefully reserved by the court, but the line of reasoning which the court follows is equally applicable to any other contract claim.

On this question the earlier decisions in the New York circuit, which are usually of such high authority that the admiralty lawyer instinctively turns to them first, cannot now be relied on. The JOHN G. STEVENS cites a number of them for the purpose of deciding adversely to the doctrine which they had promulgated. It had been the preponderance of authority in that circuit that contract claims ranked tort claims. The principal reason given for this was that these tort claims were perils of the sea, against which the owner could insure. In arriving at that decision the New York judges had discussed the English cases on which the contrary doctrine had been based, and concluded that they had not passed upon the question at all, but were governed by peculiar circumstances arising out of the fact that the vessels in the English cases had

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nearly always been foreign vessels. The New York judges also had attempted to draw a distinction between claims of pure tort and claims of quasi tort arising out of contract. This was to meet the suggestion of Dr. Lushington in the ALINE,[25] in which he had said that the contract creditor had his option whether to deal with the ship or not, but the tort creditor had not. Accordingly, the New York courts argued that this principle could only apply to torts like collision, in any event, and could not apply to cases arising out of negligent towage, or other such cases arising out of contract, though torts in form, where there had been such negligence. This distinction, also, is overruled by the JOHN G. STEVENS,[26] which was a case of negligent towage, and in which the Supreme Court, after considering the question fully, decided that cases of tort, whether arising out of contract or not, all stood on the same basis.

The JOHN G. STEVENS reserves the question whether the claim for tort should be preferred to a prior claim for seamen's wages, but the reasoning of that case applies with equal force to claims of as high merit as seamen's wages, and it is believed that, when the question is fairly presented, a preference will be given to tort claims even over claims for prior wages.[27]

The ELIN [28] decides that preference should be given even to subsequent wages on the same voyage. On this point Sir Robert Phillimore quoted approvingly from an opinion of Dr. Lushington, as follows:

"I adhere to this opinion, and I do so especially for the

[25] 1 W. Rob. Ad. 112.

[26] 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969.

[27] Rusk v. Freestone, 2 Bond, 234, Fed. Cas. No. 12,143; F. H. Stanwood, 49 Fed. 577, 1 C. C. A. 379; Nettie Woodward (D. C.) 50 Fed. 224; Evolution (D. C.) 199 Fed. 514. But in the New York district the John G. Stevens decision is still applied strictly, and seamen not in fault are preferred to collision liens. C. J. Saxe (D. C.) 145 Fed. 749.

[28] 8 P. D. 39.

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following reasons: That by the maritime law of all the principal maritime states the mariner has a lien on the ship for his wages against the owner of that ship. That he has also a right of suing the owner for wages due to him. That some uncertainty may exist as to the mariner's lien when in competition with other liens or claims, and amongst these I might instance the case of a ship in the yard of a shipwright. In such a case I should have no difficulty in saying that the lien of the shipwright would be superior to the lien of the mariner. That, in the case of a foreign ship doing damage and proceeded against in a foreign court, the injured party has no means of obtaining relief save by proceeding against the ship itself; and that, I apprehend, is one of the most cogent reasons for all our proceedings in rem. That, in a case where the proceeds of a ship are insufficient to compensate for damages done, to allow the mariner to take precedence of those who have suffered damage would be to exonerate so far the owner of the ship, to whom the damage is imputed, at the expense of the injured party—the wrongdoer at the expense of him to whom wrong has been done. Then, as to the mariner, what is the hardship to which he is exposed? It is true, he is debarred from proceeding against the ship, but his right to sue the owner remains unaffected. It is, however, not to be forgotten that in all these cases of damage, or nearly all, the cause of the damage is the misconduct of some of the persons composing the crew. This is not the case of a bankrupt owner. It will be time to consider such case when it arises."

This reasoning, that the seaman has a double remedy against the owner, and that it would be inequitable to allow the owner, to diminish the security of the party injured through his own torts by allowing the seamen to be paid out of the vessel, is certainly a strong one, and receives added strength in America by the fact that the act of June 26, 1884, allowing the vessel owners to plead their limita-

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tion of liability against contract debts, expressly reserves the rights of seamen; and so it would seem equitable that a party asserting a lien by tort should be preferred to seamen's wages, though the question cannot be considered as settled.

An instance of such torts is an unlawful conversion by the master.[29]

RELATIVE RANK AS AFFECTED BY DATE OF VESTING AMONG LIENS OF SAME CHARACTER

184. Among contract liens of the same character, those furnished on the last voyage rank those furnished on a prior voyage; the reason being that they are supposed to contribute more immediately to the preservation of the res, and therefore are for the benefit of the prior liens.[30]

In the old days, when voyages were measured by long periods of time, this was a just rule; but now, when voyages are comparatively short, it has been found necessary in the interest of justice to introduce considerable modifications. For instance, in litigation arising on the Lakes the relative priorities are determined not by the voyages, but by the seasons of navigation. For several months of the year navigation there is closed by ice, and the courts have settled upon the rule that claims furnished during one season rank those furnished during a previous season; and this rule is applied in New York harbor also as to boats which operate by seasons, like canal boats.[31]

[29] Escanaba (D. C.) 96 Fed. 252.

§ 184. [30] OMER, 2 Hughes, 96, Fed. Cas. No. 10,510; Porter v. Sea Witch, 3 Woods, 75, Fed. Cas. No. 11,289; John T. Williams (D. C.) 107 Fed. 750; Philomena (D. C.) 200 Fed. 873.

[31] CITY OF TAWAS (D. C.) 8 Fed. 170; Arcturus (D. C.) 18

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But in New York harbor work, as to boats which are being used practically all the year round, the courts have settled upon the rule that claims furnished within forty days are preferred to those furnished prior to that date, the basis of the rule being that it is usual to sell on thirty days' time, the ten days extra being allowed for making demand or proceeding. As among claims of the same general character within the forty days, there is no difference in rank.[82]

In the Western district of Washington a ninety-day rule has been established as to vessels operating in local harbors and making short trips.[83]

In the Fourth circuit, where ice does not interrupt navigation, the rule of voyages has been applied when the voyages were of any length; but among harbor tugs or vessels the practice has been that debts of the same general character are put on the same footing if they have been furnished within a year. The question in that district has been considered mainly in reference to the doctrine of staleness. A claim over a year old is considered stale as against other admiralty claims, and all within a year rank alike.[84]

This rule of considering claims over one year old as stale, however, has only been applied as among marine claims, and must not be confused with the doctrine of staleness as applied in relation to subsequent purchasers. In such case, claims have been held stale as against innocent purchasers in much less time than a year. On the other hand, the one-year rule as among maritime claims has frequently been re-

Fed. 743; J. W. Tucker (D. C.) 20 Fed. 129; Samuel Little, 221 Fed. 308, 311–312, 137 C. C. A. 136.

[82] Gratitude (D. C.) 42 Fed. 299; Samuel Morris (D. C.) 63 Fed. 736; Samuel Little, 221 Fed. 308, 137 C. C. A. 136; Leonard F. Richards (D. C.) 231 Fed. 1002. The rule does not apply to tugs and barges engaged, not in harbor, but in outside, work. In re New England Transp. Co. (D. C.) 220 Fed. 203.

[83] Edith (D. C.) 217 Fed. 300; Sea Foam (D. C.) 243 Fed. 929.

[84] Thomas Morgan (D. C.) 123 Fed. 781; Steam Dredge A, 204 Fed. 262, 122 C. C. A. 527.

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laxed, and the time extended, where the vessel has been absent from the district for long periods.

SAME—AMONG LIENS OF DIFFERENT CHARACTER

185. A later service immediately contributing to the preservation of the res may, on that account, be preferred to liens which otherwise would rank it.

The last may sometimes be preferred on that account though, if the dates were the same, the one so preferred would be an inferior claim. For instance, in the FORT WAYNE,[88] a claim for repairs to the vessel rendered when salvors had taken charge of her after a disaster (the repairs being of a character almost necessary to enable her to reach port) was preferred to prior wages, and was made to rank next to the salvage. On this point the court says:

"I can have no hesitation, therefore, in holding that the claim of the Eureka Insurance Company is established by the evidence, and is a lien on the boat, ranking in privilege next to the salvage claim of the Missouri Wrecking Company. This lien rests on the footing of money loaned or advanced for repairs to the boat, without which it would have been of little value, and could not possibly have prosecuted its business. The money so advanced and applied may be supposed, therefore, to have inured to the benefit of prior lienholders. And, according to the doctrine distinctly asserted by Dr. Lushington in the case of the Aline, 1 W. Rob. Adm. 119, 120, the persons making such advances have a priority, to the extent of the repairs made, over all other lienholders. But the case before me does not call for a more extended exposition of this principle."

§ 185. [88] 1 Bond, 476, Fed. Cas. No. 3,012. See, also, Veritas, [1901] P. 304; Sea Spray, [1907] P. 133.

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For similar reasons a materialman's claim has been preferred to a prior towage claim.[86]

SAME—BETWEEN CONTRACT AND TORT LIENS

186. On this account a later contract lien may rank a prior tort lien.

An interesting illustration of this was the Jeremiah.[87] There salvors rescued a vessel which had been in collision, and was so hung to the other vessel that it required some force to get them apart. The court held, that the salvage claim had priority over the collision claim.

So, too, in the ALINE,[88] Dr. Lushington, while preferring, as we have heretofore seen, the tort claims to a prior bottomry bond, held also that a bottomry bond for supplies subsequently furnished ranked the tort claim, for the reason that the tort claim could only go against the vessel as it was at the time of the collision, and had no right to subject a subsequent increment to the vessel like this.

SAME—AS BETWEEN TORT LIENS

187. Among tort liens, the last should rank; but this is not settled.

An interesting case on this subject was the FRANK G. FOWLER.[89] In that case there were two successive collisions so close together that no question of laches could arise between the two. Under such circumstances District Judge Choate held that the last was entitled to priority, as

[86] Dan Brown, 9 Ben. 309, Fed. Cas. No. 3,556.

§ 186. [87] 10 Ben. 338, Fed. Cas. No. 7,290. So as to subsequent liens for necessaries. Glen Island (D. C.) 194 Fed. 744.

[88] 1 W. Rob. Ad. 112.

§ 187. [89] (D. C.) 8 Fed. 331; Id. (C. C.) 17 Fed. 653.

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the first collision claim had a jus in re, or a proprietary interest, in the vessel, and therefore was somewhat in the position of an owner. In his opinion he says:

"A party who has already suffered such a damage has such a lien or hypothecation of the vessel. He is to that extent in the position of an owner—he has a quasi proprietary interest in the vessel. It is true, he cannot, as an owner, control her employment, or prevent her departure on another voyage, except by the exercise of his right or power to arrest her for the injury to himself; and in some cases the second injury may be done before he has an opportunity to arrest her. Yet, if her continued employment is not his own voluntary act, nor with his own consent, it is his misfortune that the vessel in which he has an interest is used in a manner to subject herself to all the perils of navigation. This use, unless he intervenes to libel and arrest her, is perfectly lawful as against him. If she is lost by shipwreck, of course his lien becomes valueless, and I think his interest is not exempted from this other peril to which the vessel is liable, namely, that she may become bound to any party injured through the torts of the master and mariners. The principle as to marine torts is that the ship is regarded as the offending party. She is liable in solido for the wrong done. The interests of all parties in her are equally bound by this lien or hypothecation, whether the master and mariners are their agents or not. In the case of the Aline, 1 W. Rob. Adm. 118, Dr. Lushington says: 'I am also of opinion that neither the mortgagee nor bottomry bondholder could be a competitor with the successful suitor in a cause of damage, and for this reason that the mortgage or bottomry bond might, and often does, extend to the whole value of the ship. If, therefore, the ship was not first liable for the damage she had occasioned, the person receiving the injury might be wholly without a remedy; more especially where, as in this case, the damage is done by a foreigner, and the only redress is by a proceed-

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ing against the ship.' Commenting on this decision in the case of the Bold Buccleugh, ut supra, the court says: 'In that case there was a bottomry bond before and after the collision, and the court held that the claim for damage in a proceeding in rem must be preferred to the first bondholder, but was not entitled, against the second bondholder, to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he or others were interested was liable to its value at that date for the injury done, without reference to his claim.' I think the same principle is applicable to a prior lienholder, who, by the tort of the master and mariners, had become, so to speak, a part owner in the vessel. His property—the vessel—though not by his own voluntary act, has been used in commerce. That use was not tortious as to him. It is subject in that use to all ordinary marine perils. One of those marine perils is that it may become liable to respond to another party injured by the negligence of the master and mariners. No exception to the liability of the vessel, exempting the interests of parties interested in the ship, has been established by authority."

On appeal to Circuit Judge Blatchford this decision was reversed, the judge holding that the doctrine of the last being paid first only applied to such liens as were for the benefit of the vessel, and tend to the preservation of the res, and did not apply to torts, which tend rather to destroy than to benefit.

If the principles laid down by the Supreme Court in the JOHN G. STEVENS are the guide, the District Judge was the one who should be followed. When we once settle the doctrine that a maritime lien is a jus in re, or a proprietary interest in the ship, it follows necessarily that the owner of that interest, though not guilty of laches, and having no control over the master in charge, impliedly takes the risks

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of subsequent accidents, and holds the ship out to the world as a thing of life, liable to make contracts and to commit torts, and that he should not be heard to dispute the claims of others who have been brought into relations with her upon this basis.[40]

RELATIVE RANK AS AFFECTED BY SUIT OR DECREE

188. The earlier decisions held that among claims of otherwise equal dignity the party first libeling was entitled to be first paid, on the theory that an admiralty lien was a mere right of arrest; but the later decisions, establishing it as a proprietary right or interest in the thing itself, have deduced from that principle that a prior petens has no advantage, and that the institution of suit does not affect the relative rank of liens.[41]

In fact, in many districts, obtaining a decree does not give an inferior claim a priority which it would not otherwise have, but merely entitles the claimant to assert his claim without further proof, and debars others from contesting it on its merits, leaving open simply the question of priority.[42]

In England a lienor who secures an admiralty decree for his claim is held to have obtained the highest rank that the law can give, and to be entitled to priority over all others.[43]

This is a question largely affected by local practice and local rules. In many districts independent libels are filed

[40] America (D. C.) 168 Fed. 424.

§ 188. [41] CITY OF TAWAS (D. C.) 8 Fed. 170; J. W. Tucker (D. C.) 20 Fed. 129; Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343.

[42] CITY OF TAWAS (D. C.) 8 Fed. 170; Aina (D. C.) 40 Fed. 269.

[43] Abbott's Law of Merchant Ships, pt. 6, c. 4, § 2; Bernard v. Hyne, 6 Moore, P. C. 56; 4 Notes of Cases, 498; 2 W. Rob. 451; 13 Eng. Rep. 604.

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against the vessel. In some the vessel is arrested under the first libel, and the others come in by petition. In some districts, after a certain time all the claims are referred to a commissioner, to ascertain and report their relative rank. In others, in the event of no contest, a decree is entered at the return day, or as soon thereafter as possible, giving petitioners a judgment against the vessel, and directing a sale. It is impossible to lay down any rule on the subject.

In the Eastern district of Virginia the practice is that all claims filed up to the answer day are paid according to their relative character, it matters not which libels first. But all claims after the answer day, though otherwise prior in dignity, come in subject to those already filed. In that district the rule has been that claims coming in after a decree has been entered, and an order of sale made, are subject to the others, the reason being that the rules of that district allow nearly three weeks between the libel day and the answer day, which therefore give ample time for coming in, and it being further thought that bidders at the sale ought to know their relative rights in order to enable them to decide upon their bids. Those creditors who stay out until others more diligent than themselves bring suit, secure a sale, attend the sale, and make the vessel bring a good price, are not permitted to intervene then, and displace those who have borne the heat and burden of the fray.

In the absence of special equities, the rule of practice in the Eastern district of Virginia would certainly seem a fair one, well calculated to make vessels bring their full value, and to make marine claimants assert their claims seasonably, without allowing them to prejudice the rights of others.[44]

[44] See, also, Saracen, 2 W. Rob. Ad. 453; Bradley v. Corn Exchange, Inland Navigation & Fire Ins. Co., 5 Wall. 87, 18 L. Ed. 517; Dode (D. C.) 100 Fed. 478; James G. Swan (D. C.) 106 Fed. 94.

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CHAPTER XVIII

A SUMMARY OF PLEADING AND PRACTICE

189. Simplicity of Admiralty Procedure.
190. Proceedings in Rem and in Personam.
191. The Admiralty Rules of Practice.
192. The Libel.
193. Amendments.
194. The Process.
195. Decrees by Default.
196. The Defense.
197. The Trial.
198. Evidence.
199. Attachments in Admiralty.
200. Set-Off.
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203. Costs.
204. Enforcing Decrees.
205. The Fifty-Ninth Rule.
206. The Courts having Admiralty Jurisdiction.
207. The Process of Appeal.
208. Questions of Fact on Appeal.
209. New Evidence.

SIMPLICITY OF ADMIRALTY PROCEDURE

189. Admiralty procedure is like chancery pleading in simplicity and flexibility.

Admiralty pleading and practice are simple; more so even than proceedings in chancery, though governed largely by the liberal principles which prevail in that forum.[1]

§ 189. [1] Richmond v. New Bedford Copper Co., 2 Low. 315, Fed. Cas. No. 11,800; Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391, 106 C. C. A. 501; U. S. v. Cornell Steamboat Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. Ed. 987.

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By this it is not meant that an admiralty court has any chancery jurisdiction. It has no jurisdiction, for instance, of matters of account, except incidentally, where an account is necessarily involved in exercising jurisdiction conferred on some other ground.[2]

Nor has it jurisdiction of controversies arising from titles merely equitable.[3]

190. PROCEEDINGS IN REM AND IN PERSONAM

Admiralty proceedings fall under two great classes—proceedings in rem and proceedings in personam. In the first, the thing itself against which the right is claimed or liability asserted is proceeded against by name, as a contracting or offending entity, arrested or taken into legal custody, and finally sold to answer the demand, unless its owner appears and releases it by bond or stipulation.

A proceeding in personam is an ordinary suit in admiralty against an individual. The process upon it is a monition, which substantially corresponds to an ordinary summons in a common-law suit, or it may be accompanied in proper cases by a process of foreign attachment, or it may also have a warrant of arrest of the person in cases where the state law permits an arrest.[4]

The distinction between a proceeding against the res itself to enforce its own obligation and a proceeding against the owner to enforce his own obligation, whether connected with the res or not, and whether accompanied by an attachment as incidental to the owner's liability or not is vital.[5]

Whether to proceed in rem or in personam in a given case

[2] Grant v. Poillon, 20 How. 162, 15 L. Ed. 871; H. E. Willard (C. C.) 52 Fed. 387.

[3] ECLIPSE, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269.

§ 190. [4] Admiralty rule 48 (29 Sup. Ct. xliv); Atkins v. Fiber Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841.

[5] Knapp Stout & Co. Co. v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 825, 44 L. Ed. 921.

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is rather a question of substantive law than of practice. It depends on the question whether there is an admiralty lien, and the discussion under the previous subjects of these lectures must be adverted to in order to decide it. Admiralty rules 12–20 contain provisions when the suit may be in rem, when in personam, and when in both. But they are not intended to be exclusive, or to say that in cases not covered by their terms there shall be no remedy, whether in either form or in both combined.[6]

"Proceedings in Rem Bind the World"

It is a maxim of the law that proceedings in rem bind the world. In such proceedings no notice is served on the owner. It is presumed that a seizure of his property will soon come to his knowledge, and cause him to take steps to defend it; and when he appears for that purpose he comes in rather as claimant or intervenor than as defendant. Hence, if he does not appear, the judgment binds only the property seized, and, if it does not satisfy the claim, no personal judgment can be given against him for the deficiency. In ordinary suits of foreign attachment in the state courts, the debtor is defendant by name, and, if he appears, a personal judgment may be rendered against him; but not so in admiralty suits in rem, for the real defendant there is the vessel or other property, and the owner appears not as defendant, but as claimant.[7]

It follows from this principle that when an owner comes in for the purpose of protecting his interest in the res, he does not submit himself generally to the jurisdiction of the court so as to permit a judgment in personam against him for any deficit. This springs logically from the doc-

[6] CORSAIR, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727; Thomas P. Sheldon (D. C.) 113 Fed. 779; Samson (D. C.) 197 Fed. 1017.

[7] Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; O'Brien v. Stephens, 11 Grat. (Va.) 610; Davis, 10 Wall. 15, 19 L. Ed. 875; Pleroma (D. C.) 175 Fed. 639.

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trine applied in America that the res is the real contractor or offender, and that the owner's interest is incidental.[8]

Herein is a sharp distinction between the American and English law. In England a respondent is really a defendant, and judgment goes against him for any deficiency.[9]

This was because the procedure in rem in England was in its origin not based on any theory of direct responsibility attaching to the res, but as a means of compelling the owner's appearance. Their process to this day, though naming the ship and not the owners in terms, commands them to enter an appearance, and the arrest of the ship follows as an incident.[10]

When the maxim says that a proceeding in rem binds the world, it means that all having any interest in the res have constructive notice of its seizure, and must appear and protect their interest. Hence, as every obligation implies a correlative right, no one is bound to appear whose interest is of a character which does not permit him to appear; and such are not bound by the proceeding, except in so far

[8] Monte A. (D. C.) 12 Fed. 331; Ethel, 66 Fed. 340, 13 C. C. A. 504; Lowlands (D. C.) 147 Fed. 986; Nora (D. C.) 181 Fed. 845. In the Minnetonka, 146 Fed. 509, 515, 77 C. C. A. 217, is a holding that a personal decree can be rendered against the claimant. It was a suit which might have been brought originally in rem and in personam, though it was apparently in rem. Hence an amendment adding the proceeding in personam and directing the issue of new process thereon would have been clearly allowable. But how this could have been done without such an amendment, or how it can be done in cases where the procedure could not have been in rem and in personam at the outset, is beyond the author's comprehension. CORSAIR, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.

[9] Gemma, [1899] P. 285; Dupleix, [1912] P. 8.

[10] 2 Select Anglo-American Legal Essays (Mears' Essay) 345. In Mayer's Admiralty Law & Practice, 9 et seq., and also 26 et seq., is a thorough discussion of the difference between the English and American doctrine, and the reason therefor. In the appendix to Smith's Admiralty Law and Practice is a full collection of the English forms.

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as they may be bound through their vendors or other parties in privity.[11]

191. THE ADMIRALTY RULES OF PRACTICE

In 1842 Congress passed an act directing the Supreme Court to prepare and promulgate rules to govern the procedure and practice in admiralty. In pursuance of this statute, the court promulgated the rules to regulate the admiralty practice in the inferior courts now known and cited as the "Admiralty Rules." They form an admirably simple and harmonious system, and have worked so well that they are to-day practically in the form of the original draft, the only material change being the addition of a few to regulate limited liability proceedings, and one to authorize bringing in the other vessel where only one of two colliding vessels is libeled.

An admiralty court is not a court of terms, but is always open for the transaction of business.

192. THE LIBEL

The first step in an admiralty suit is to file the libel. This is the written statement of the cause of action, corresponding to the declaration at common law and the bill in equity. It must be properly entitled of the court; addressed to the judge; must state the nature of the cause; that the property is within the district, if in rem, or the parties, their occupation and residence, if in personam; must then state the facts of the special case in separate articles clearly and concisely, and conclude with a prayer for process and a prayer for general relief. It may propound interrogatories to the adversary.[12]

[11] ECLIPSE, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269; Cushing v. Laird, 107 U. S. 69, 2 Sup. Ct. 196, 27 L. Ed. 391.

§ 192. [12] Admiralty rule 23 (29 Sup. Ct. xli).

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The libel should be in the name of the real party in interest, not in the name of one for the benefit of another. But the better opinion is that it may be amended by inserting the names of the real parties, or that, if they come in by supplemental libel, the proceedings will thereby be made regular.[13]

This principle does not prevent suits in a representative capacity. For instance, the master has wide powers as agent of all concerned, and may sue on behalf of owners of ship and cargo, and frequently on behalf of the crew.[14]

All parties entitled to similar relief on the same state of facts may join as libelants, in order to avoid multiplicity of suits. And for the same reason distinct causes of action may be joined in one libel. The practice in this respect is very liberal.[15]

In stating the facts of the special case, useless verbiage and archaic terms, may safely be omitted. The narration may be made as simple as possible, provided, always, that those essentials common to any civilized system of pleading be observed—to state the case with sufficient detail to notify the adversary of the grounds of attack, so that he may concert his defense. For instance, a libel in a collision case must specify the acts of negligence committed by the other vessel, though, if it does not do so, but merely charges neg-

[13] Ilos, Swab. 100; Minna, L. R. 2 Ad. & Ec. 97; Fretz v. Bull, 12 How. 466, 13 L. Ed. 1068; Burke v. M. P. Rich, Fed. Cas. No. 2,161; Anchoria (D. C.) 9 Fed. 840; Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993; Eastfield S. S. Co. v. McKeon (D. C.) 186 Fed. 357 (reversed on another point 201 Fed. 465, 120 C. C. A. 249; the court however stating—page 470—that it concurred with the District Court on this point).

[14] Commander in Chief, 1 Wall. 51, 17 L. Ed. 609; Blackwall, 10 Wall. 1, 19 L. Ed. 870; Mercedes (D. C.) 108 Fed. 559.

[15] Queen of the Pacific (D. C.) 61 Fed. 213; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, reversed Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419, but not on this question; Oregon, 133 Fed. 609, 68 C. C. A. 603.

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ligence in general, and no exceptions are filed, it will not prevent the case from proceeding.[16]

193. AMENDMENTS

In case the libel is thought defective, great latitude is allowed in amendments. Formal amendments are a matter of course, and amendments in matters of substance are in the discretion of the court. They may be made even on appeal, but not to the extent of introducing a new subject of litigation.[17]

But the power of the court to allow amendments is a judicial discretion, not a mere caprice. It will not be so exercised as, under the guise of liberality to one party, to do injustice to the other. Hence, after the cause is at issue, and evidence has been taken, or the witnesses scattered, a court would be chary in allowing amendments, especially of matters known to the applicant for any length of time before the application is made.

"The propriety of granting this privilege in any particular case will depend on the circumstances by which it is attended. The application is addressed to the sound discretion of the court, and this discretion is to be exercised with a just regard to the rights and interests of both parties; care being taken that for the sake of relieving one party injustice shall not be done to the other." [18]

[16] MARPESIA, L. R. 4 P. C. 212; Vim (D. C.) 2 Fed. 874; H. P. Baldwin, 2 Abb. U. S. 257, Fed. Cas. No. 6,811; Barber v. Lockwood (D. C.) 134 Fed. 985.

§ 193. [17] Admiralty rule 24 (29 Sup. Ct. xli); Graham v. Oregon R. & Nav. Co. (D. C.) 134 Fed. 692; Indiana Transp. Co., Ex parte, 244 U. S. 456, 37 Sup. Ct. 717, 61 L. Ed. 1253 (a case growing out of the Eastland disaster, and emphasizing the principle that an appearance to defend does not constitute a submission to jurisdiction for all purposes).

[18] 2 Conk. Adm. 258. As examples of the limit put upon this power of amendments, see Keystone (D. C.) 31 Fed. at page 416; Thom-

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194. THE PROCESS

On filing the libel in rem an order for process is filed. It recites, "On reading the libel, and otherwise complying with the rules of court, let process issue."

Thereupon the process of arrest issues. It is directed to the marshal, and instructs him to seize the vessel, and give notice to all interested that on a certain day, fixed by the rules of each district, the case will come on for hearing, when and where they are cited to appear, and interpose their claims, and to return his action thereunder to the court.

"Arrest" is nothing more than the term applied in admiralty parlance to a seizure of the res.[19]

The time fixed for hearing and set out in the warrant of arrest varies with the rules in different districts. It is usually about two weeks off, for the merit of admiralty proceedings is their rapidity.

In the Eastern district of Virginia the return day is Tuesday of the week next after filing the libel, and the hearing day is ten days after that, which makes it always fall on Friday.

The warrant of arrest is signed by the clerk, and under the court seal. The marshal, on receiving it, makes out three notices, signed by himself, reciting that by virtue of the warrant he has seized the said vessel, and has her in his custody, and that all persons are cited to appear on the hearing day, and show cause why a final decree should not pass as prayed. He takes the warrant of arrest and one of these proclamations, and starts out on a quest for his prey.

as Melville (D. C.) 31 Fed. 486; McKinlay v. Morrish, 21 How. 347, 16 L. Ed. 100; Lamb v. Parkman, 1 Spr. 343, Fed. Cas. No. 8,020; Coffin v. Jenkins, 3 Story, 108, Fed. Cas. No. 2,948; Philadelphian, 60 Fed. 423, 9 C. C. A. 54; O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469; Circassian, 2 Ben. 171, Fed. Cas. No. 2,723.

§ 194. [19] Pelham v. Rose, 9 Wall. 103, 19 L. Ed. 602.

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On finding her, he reads the warrant of arrest to the captain or other person in charge, and he pastes a copy of his proclamation on a conspicuous part of the vessel. Then he returns to the court-room door, and pastes another there. And then, by way of making it more widely known, he goes to the newspaper designated by court rule, and publishes a notice in substantially the same form. Meanwhile a ship keeper is in charge of the ship.

The marshal cannot serve process upon a ship in custody of an officer of a state court. Such an officer cannot sell the title clear of maritime liens, and so the admiralty claimant must wait till the other court lets go. As soon as its custody ends, the admiralty claimant may proceed against it, even in the hands of the state court purchaser.[20]

A vessel owned or in use by a Government is not subject to process.[21]

If the vessel owner wants possession of his ship, he is allowed, by section 941, Rev. St. (U. S. Comp. St. § 1567), to come in, give bond or stipulation in double the amount of libelant's claim, and release her. This is a substitute for the vessel, and no suit is necessary upon it, but judgment may be given against the obligors on it in the final decree.[22]

This bond or stipulation is so far a substitute for the vessel that it discharges the claim against her which is being asserted in the libel, and she cannot be re-arrested for the same cause of action, unless there have been circumstances of fraud or misrepresentation in giving it, or unless

[20] TAYLOR v. CARRYL, 20 How. 583, 15 L. Ed. 1028; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed 981; Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533.

[21] Siren, 7 Wall. 152, 19 L. Ed. 129; G. A. Flagg (D. C.) 256 Fed. 852; Broadmayne, [1916] P. 64; 32 T. L. R. 304; Porto Alexandre, 36 T. L. R. 28, 66. Since the text was written Congress has passed the act of March 9, 1920, authorizing suits against the United States. The act will be found in the Appendix, p. 506.

[22] See post, p. 497.

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it was a case in which such an undertaking could not legally be given.[23]

On the theory that a bona fide effort to assert one's rights should not involve any unpleasant aftermath, a libelant who fails in his suit is not liable for his unsuccessful arrest of defendant's property, unless his action was malicious.[24]

195. DECREES BY DEFAULT

If, on the hearing day, no defense has been interposed, then, under the provisions of admiralty rule 29, all persons are deemed in contumacy and default, the libel is taken for confessed, and the court hears the cause ex parte. In such case no proof is necessary, except as to damages, if unliquidated, and the only hearing is the presentation of a decree to the judge.[25]

In other words, a decree by default in admiralty resembles office judgments or writs of inquiry at common law, or a bill taken for confessed in equity.[26]

In case of such default the court may at any time within ten days, for cause shown, reopen the decree, and permit defense. But in default decrees this power is limited

[23] Roberts v. The Huntsville, Fed. Cas. No. 11,904; Union, Fed. Cas. No. 14,346; White Squall, Fed. Cas. No. 17,570; Wm. F. McRae (D. C.) 23 Fed. 558; Monarch (D. C.) 30 Fed. 283; Mutual (D. C.) 78 Fed. 144; Cleveland (D. C.) 98 Fed. 631. The I. F. Chapman, 241 Fed. 836, 154 C. C. A. 538, is, in the author's judgment, contrary to the weight of authority, and sustainable, if at all, only under its peculiar facts.

[24] Alcalde (D. C.) 132 Fed. 576; Admiral Cecille (D. C.) 134 Fed. 673; Watt v. Cargo of Lumber, 161 Fed. 104, 88 C. C. A. 268.

§ 195. [25] Cape Fear Towing & Transp. Co. v. Pearsall, 90 Fed. 435, 33 C. C. A. 161.

[26] Miller v. U. S., 11 Wall. 294, 20 L. Ed. 135; United States v. Mollie, 2 Woods, 318, Fed. Cas. No. 15,795; Water Witch (C. C.) 44 Fed. 95; Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105; Cape Fear Towing & Transp. Co. v. Pearsall, 90 Fed. 435, 33 C. C. A. 161.

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to ten days. On the lapse of that time the decree becomes as final as a court judgment after the adjournment of the term.[27]

There is some conflict of authority whether there is such a thing known to the admiralty law as a libel of review. The better opinion seems to be that there is; but it is a power reluctantly exercised, and lies only for errors apparent on the face of the record, or for fraud. It does not lie to enable a party to set up facts or defenses which his own carelessness overlooked.[28]

196. THE DEFENSE

If the defendant does not wish to let his case go by default, he raises any legal points apparent on the libel by exception, which corresponds to a demurrer,[29] and he sets up defenses of fact by answer. This must be on oath or affirmation, and must be full and explicit to each article of the libel, and it may propound interrogatories to the libelant.[30]

If it is not sufficiently full, the libelant may except.

An answer in admiralty has only the effect of a denial. Unlike an answer in chancery, it is not evidence in favor of respondent.[31]

[27] Admiralty rule 40 (29 Sup. Ct. xliii); SNOW v. EDWARDS, 2 Low. 273, Fed. Cas. No. 13,145; Illinois, 5 Blatchf. 256, Fed. Cas. No. 7,002; Northrop v. Gregory, 2 Abb. U. S. 503, Fed. Cas. No. 10,327.

[28] NEW ENGLAND, 3 Sumn. 495, Fed. Cas. No. 10,151; Northwestern Car Co. v. Hopkins, 4 Biss. 51, Fed. Cas. No. 10,334; Dexter v. Arnold, 3 Mason, 284, Fed. Cas. No. 3,855; Columbia (D. C.) 100 Fed. 890; New York, 113 Fed. 810, 51 C. C. A. 482; Hall v. Chisholm, 117 Fed. 807, 55 C. C. A. 31.

§ 196. [29] White v. Cynthia, Fed. Cas. No. 17,546a.

[30] Admiralty rule 27 (29 Sup. Ct. xlii).

[31] Cushman v. Ryan, 1 Story, 91, Fed. Cas. No. 3,515; Eads v. The H. D. Bacon, Newb. Adm. 274, Fed. Cas. No. 4,232.

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Things neither admitted nor denied by the answer are not taken as true, but must be proved.[32]

The defendant, in his answer, may set up want of jurisdiction of the subject-matter and a defense on the merits.[33]

Of course, he cannot plead mere want of jurisdiction over the person, and defend on the merits, as that would be a general appearance in any system of pleading.[34]

Hence, when the facts showing lack of jurisdiction over the person or exemption from suit do not appear on the libel, such defense must be set up by exception, which corresponds more to a dilatory plea than to a demurrer, as it sets up additional facts.[35]

The answer, if sufficient, or if not excepted to, puts the case at issue. No replication is necessary.[36]

197. THE TRIAL

As admiralty is not a court of terms, the case goes at once on the trial calendar, and may be called up at any time convenient.

It is tried before the judge (there are no juries in admiralty proceedings proper), who hears the witnesses ore tenus, or, if he sees fit, appoints a commissioner to take the evidence down in writing, and report it to him later. In this matter the practice varies in the different districts. In the Eastern district of Virginia the rule requires that in cases involving over $500 the evidence shall be ore tenus, and taken down in shorthand; and the stenographer's notes, when written out, constitute the record in the event of an appeal.

[32] Clarke v. Dodge Healy, 4 Wash. C. C. 651, Fed. Cas. No. 2,849.

[33] Lindrup (D. C.) 62 Fed. 851.

[34] Jones v. Andrews, 10 Wall. 329, 19 L. Ed. 935.

[35] August Belmont (D. C.) 153 Fed. 639; Koenigin Luise (D. C.) 184 Fed. 170, 172.

[36] Admiralty rule 51 (29 Sup. Ct. xliv).

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A similar practice is prevalent in the other jurisdictions.[87]

On account of the shifting character of marine witnesses, the cases are rare where all the evidence can be offered in court. In order to save the testimony of departing witnesses, or secure the testimony of nonresidents, it is usually necessary to take many depositions de bene esse. They are taken on notice, pursuant to the provisions of section 863, Rev. St. (U. S. Comp. St. § 1472), or the act of March 9, 1892, permitting them to be taken as in the state courts.[88]

In practice, counsel are liberal with each other in such matters, accepting short notice, allowing the evidence to be taken in shorthand, waiving the witnesses' signatures, and even the filing of the deposition till the hearing.

When the case comes on, it is heard and argued substantially as a chancery cause would be.

If the damages are not known or agreed to, the judge, in the event of a decision for libelant, usually refers the matter to a commissioner by an interlocutory decree to inquire into and assess the damages. Under admiralty rule 44 this commissioner has about the powers of a master in chancery. Those dissatisfied with his report may except to it, and upon it and such exceptions the court renders its final decree.

198. EVIDENCE

Section 858 of the Revised Statutes, as amended June 29, 1906, provides that the competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held.[89]

§ 197. [87] Neilson v. Coal, Cement & Supply Co., 122 Fed. 617, 60 C. C. A. 175; Rogers v. Brown (D. C.) 136 Fed. 813.

[88] 27 Stat. 7 (U. S. Comp. St. § 1476).

§ 198. [89] U. S. Comp. St. § 1464. For the statutes regulating evidence, see post, p. 498. See, also, Hughes on Federal Procedure, 10.

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199. ATTACHMENTS IN ADMIRALTY

It has been settled that the common-law and chancery courts of the United States have no jurisdiction of suits by foreign attachment against nonresidents, for the reason that by the federal statutes no person can be sued, as a general rule except in the district where he lives.[40]

Since the last-cited decision, however, the Tucker-Culbertson Act allows suits to be brought in the district of the plaintiff's residence, so that a process of foreign attachment could be sustained in such district if the defendant can be served with process.

In admiralty, however, a libel accompanied by an attachment can be sustained, as these statutes do not apply to the admiralty courts.[41]

200. SET-OFF

Set-off cannot be pleaded in admiralty as it is the creature of statutes which were passed for the common-law and chancery courts, and were not intended to apply to the admiralty courts.[42]

This, however, does not prevent a counterclaim arising out of the same transaction from being used to recoup the damages.[43]

§ 199. [40] Ex parte Des Moines & M. R. Co., 103 U. S. 794, 26 L. Ed. 461.

[41] IN RE LOUISVILLE UNDERWRITERS, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991; Reilly v. Philadelphia & R. R. Co. (D. C.) 109 Fed. 349.

§ 200. [42] Willard v. Dorr, 3 Mason, 91, Fed. Cas. No. 17,679; O'Brien v. 1,614 Bags of Guano (D. C.) 48 Fed. 726.

[43] Bowker v. U. S., 186 U. S. 135, 22 Sup. Ct. 802, 46 L. Ed. 1090; Howard v. 9,889 Bags of Malt (D. C.) 255 Fed. 917.

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201. LIMITATIONS

Admiralty is not bound by the statutes of limitation, for this same reason that they do not in terms apply to those courts. Hence, where the rights of third parties have intervened, an admiralty court will hold a claim stale in a much shorter period than that prescribed by the statutes, and we have seen in other connections that among admiralty liens of the same character the last is preferred to the first.[44]

But, as between the original parties, unless special circumstances have intervened, the admiralty courts adopt the statutes of limitation by analogy, the doctrine being substantially the same as the chancery doctrine on the subject.[45]

202. TENDER

In the matter of tender, admiralty is not as rigid as the other courts. A formal offer in actual cash is not de rigueur. Any offer to pay, followed up by a deposit of the amount admitted in the registry of the court, is sufficient.[46]

§ 201. [44] Ante, pp. 105, 115, 392; Nikita, 62 Fed. 936, 10 C. C. A. 674.

[45] Sarah Ann, 2 Sumn. 206, Fed. Cas. No. 12,342; Queen (D. C.) 78 Fed. 155; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419; Southard v. Brady (C. C.) 36 Fed. 560; Southwark (D. C.) 128 Fed. 149; Davis v. Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381.

§ 202. [46] Dedekam v. Vose, Fed. Cas. No. 3,729; Boulton v. Moore (C. C.) 14 Fed. 922.

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203. COSTS

In the matter of costs admiralty courts exercise a wide discretion, and often withhold them as a punishment in case the successful litigant has been guilty of oppression, or has put his opponent, by exorbitant demands, to unnecessary inconvenience or expense.[47]

The act of July 20, 1892, as amended June 25, 1910,[48] permits suits in forma pauperis without requiring security for costs. The act, if intended to apply to the admiralty courts, frequently works great injustice by tying up large steamers in foreign ports till they give bond; and they are remediless if the cause of action is unfounded.

204. ENFORCING DECREES

If, after the trial and all its incidents are over, the decision is in favor of libelant, and there is no appeal, the final decree, in case the vessel has been released, goes against the stipulators, and under admiralty rule 21 can be enforced by a writ of fieri facias.

In case the vessel has not been released, the final decree provides that she be advertised and sold by the marshal of the district, who alone, under admiralty rule 41, can perform this duty.[49] The practice is to make the sale for cash, and the rule requires it to be deposited in the registry of the court, to await its further orders.

A sale by the marshal vests a clear title against the world.[50]

§ 203. [47] Shaw v. Thompson, Olcott, 144, Fed. Cas. No. 12,726; Lyra (C. C. A.) 255 Fed. 667.

[48] 27 Stat. 252; 36 Stat. 866 (U. S. Comp. St. § 1626); post, p. 505.

§ 204. [49] Lambert's Point Towboat Co. v. U. S., 182 Fed. 388, 104 C. C. A. 598.

[50] Trenton (D. C.) 4 Fed. 657; Evangel (D. C.) 94 Fed. 680.

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Admiralty rule 42 requires money in the registry of the court to be drawn out by checks signed by the judge.

Under rule 43, parties having any interest in the vessel may come in by petition, and assert it. Under this, a party holding any sort of lien may come in, but not any party having a mere personal claim upon the owner.[51]

205. THE FIFTY-NINTH RULE

This rule[52] permits the owner of one of two vessels which has been libeled in a collision case by a third party to bring in the other vessel if he can find her, and have the damages assessed against either or both, according to the fact.[53]

The principle of this rule has been applied to many analogous cases, in the effort to place the responsibility where it equitably belongs.[54]

206. THE COURTS HAVING ADMIRALTY JURISDICTION

The federal Constitution vests the judicial power in one Supreme Court and such inferior courts as Congress shall from time to time establish. Acting under this authority, Congress, by the Judiciary Act of 1789, divided the United States into districts, and established in each district two

[51] Edith, 94 U. S. 518, 24 L. Ed. 167; Leland v. Medora, 2 Woodb. & M. 92, Fed. Cas. No. 8,237; Brackett v. Hercules, Gilp. 184, Fed. Cas. No. 1,762.

§ 205. [52] Admiralty rule 59 (29 Sup. Ct. xlvi).

[53] Ante, p. 320; Hudson, Fed. Cas. No. 6,828; Joice v. Canal Boats Nos. 1,758 and 1,892 (D. C.) 32 Fed. 553; Greenville (D. C.) 58 Fed. 805.

[54] Dailey v. New York (D. C.) 119 Fed. 1005; Crown of Castile (D. C.) 148 Fed. 1012; Evans v. New York & P. S. S. Co. (D. C.) 163 Fed. 405; Daylight (D. C.) 206 Fed. 864; Barnstable, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954.

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courts of original jurisdiction, the District Court and the Circuit Court. To the District Court all classes of peculiar or special character were assigned, such as suits for penalties, admiralty, and bankruptcy cases, and minor criminal cases. On the Circuit Court was conferred the general current litigation usual between man and man, including all cases of common law and equity, and more important criminal cases. The Circuit Court was also given appellate jurisdiction of most of the subjects of District Court cognizance, including admiralty cases.

There was a District Judge appointed for each district, who was empowered to hold both the District and Circuit Courts for that district, except that he could not sit in the Circuit Court on appeals from his own decisions. To provide an appellate judge for such cases, the districts were grouped into larger units, called "circuits," equal in number to the justices of the Supreme Court, and each Justice, during the recess of that court, went around his circuit, holding the Circuit Court in each district.

Thus appeals from the District Courts in admiralty were tried in the Circuit Court by the Supreme Court Justice for that circuit. The appeal took up questions both of law and fact for review, the notes of evidence taken by the District Judge being the evidence on appeal; but the trial was de novo, being rather a new trial than an appeal, and new evidence could be introduced in the appellate court. In the event of an adverse decision in the Circuit Court, there was a second appeal, both on law and fact, to the Supreme Court, in cases involving over $2,000.

The increase of litigation consequent on the Civil War was so great that it was found necessary to increase the judicial force, and lighten the labors of the Supreme Court justices. Hence, in 1869, Congress enacted that there should be an additional judge appointed for each judicial circuit, to be called a "Circuit Judge." He could hold the Circuit Court in any district of his circuit.

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The docket of the Supreme Court became more and more congested, and further relief became imperative. And so, by the act of February 16, 1875, Congress raised the limit of appeals to the Supreme Court to $5,000, and further provided that in admiralty there should no longer be an appeal to that court on questions both of law and fact, but that the Circuit Judge on an admiralty appeal from the district court should make a finding of the facts, and draw his conclusions of law therefrom, and the case then went to the Supreme Court simply on this finding, and no longer on all questions, both of law and fact. This, however, still left the litigant one appeal on questions of fact—that from the District Court to the Circuit Court.

This continued to be the law until the act of March 3, 1891, known as the "Appellate Courts Act." It created an additional Circuit Judge for each circuit, abolished the appellate jurisdiction of the Circuit Court, and established a new appellate court in each circuit, composed of the Circuit Justice and the two Circuit Judges, but with the District Judges used to fill vacancies. Under this law admiralty appeals from the District Court go to this appellate court, with no restriction as to the amount involved, and on the full record of the District Court, thereby nominally giving a review of questions both of law and fact. This new appellate court is the court of last resort in admiralty cases, except that it may certify to the Supreme Court for decision any questions as to which it may desire instruction, and except, also, that the Supreme Court may, by certiorari, bring up for review any cases that it may deem of sufficient importance.

The Circuit Court, having lost its appellate jurisdiction by the Appellate Courts Act of 1891, was finally abolished, and its original jurisdiction transferred to the District Court, by the act of March 3, 1911, known by the short title of the "Judicial Code," but this is immaterial to the pres-

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ent subject, as the Circuit Court had no original jurisdiction in admiralty.[55]

207. THE PROCESS OF APPEAL

The process of appeal varies in the different circuits under their different rules. In the Fourth circuit, as soon as the final decree is entered in the District Court, a petition is filed in that court, addressed to the judges of the Circuit Court of Appeals, praying an appeal, and assigning errors. On this the District Judge (or any judge of the appellate court) indorses: "Appeal allowed. Bond required in the penalty of $———, conditioned according to law"—and signs it. He also signs the citation, which is the notice of appeal given to the other side, and cites him to appear in the appellate court at a day named to defend his decree. A certified copy of the entire transcript is then obtained from the district clerk, and filed with the clerk of the appellate court, who dockets the case, and, when secured as to costs, has the record printed.

Under the act of February 13, 1911, the appellant is allowed to print his own record, instead of securing a transcript from the clerk of the trial court and then having it printed by the clerk of the appellate court.[56]

The act of March 3, 1891, provides that the appeal must be taken within six months from the decree complained of, "unless a lesser time is now allowed by law." Appeals in admiralty cases are governed by the six months limitation, and are unaffected by the clause above quoted.[57]

§ 206. [55] 36 Stat. 1087 (U. S. Comp. St. §§ 968–1274).

§ 207. [56] 36 Stat. 901 (U. S. Comp. St. §§ 1656, 1657).

[57] New York, 44 C. C. A. 38, 104 Fed. 561; Robins Dry Dock & Repair Co. v. Chesbrough, 216 Fed. 121, 132 C. C. A. 365.

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208. QUESTIONS OF FACT ON APPEAL

Although the intent of Congress to give an appeal on questions both of law and fact is clear, and it is notorious that the act of February 16, 1875, while it was in force, was far from satisfactory, this has been largely frittered away by judicial decisions. The appellate courts have gone very far in practically refusing to review questions of fact where the District Judge has had the witnesses before him, though not so far where part or all of the evidence has been by deposition. This doctrine is largely an abdication of the trust confided in them, and, for an admiralty court, smacks too much of the old common-law fiction as to the sacredness of the jury's verdict. Under the old law giving a review on questions of law and fact the Supreme Court has more than once spoken of a right of appeal as something more than a shadow.[58]

A finding, unsupported by any evidence or ignoring material and proven facts, will be disregarded.[59]

In fact, this theory about the trial judge being endowed with clairvoyance because he saw the witnesses has degenerated into a mere makeweight for that filius nullius, the per curiam opinion.

The judicial ermine, unlike the mantle of Elijah, confers no supernatural powers. The most truthful men often make the worst witnesses. If the trial judge could decide

§ 208. [58] Post v. Jones, 19 How. 150, 15 L. Ed. 618; ARIADNE, 13 Wall. 475, 20 L. Ed. 542; City of Hartford, 97 U. S. 323, 24 L. Ed. 930; Gypsum Prince, 67 Fed. 612, 14 C. C. A. 573; Glendale, 81 Fed. 633, 26 C. C. A. 500; Albany, 81 Fed. 966, 27 C. C. A. 28; Captain Weber, 89 Fed. 957, 32 C. C. A. 452; Lazarus v. Barber, 136 Fed. 534, 69 C. C. A. 310; Kia Ora, 252 Fed. 507, 164 C. C. A. 423.

[59] Darlington v. Turner, 202 U. S. 195, 26 Sup. Ct. 630, 50 L. Ed. 992; Fullerton, 211 Fed. 833, 128 C. C. A. 359.

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cases at their close, as juries render verdicts, there would be more force in the idea. But in districts of crowded dockets, where numerous cases, each with numerous witnesses, are tried in rapid succession, and then taken under advisement for months, nothing short of a moving picture screen, with a photographic-phonographic attachment, could bring it back to the judicial mind. To give this amiable fiction the scope which it has often been given is in effect to deny an appeal on questions of fact, which the statutes are supposed to give. That seeing the witnesses is an advantage cannot be denied. But its importance has been grossly exaggerated. Surely the combined intelligence of the three appellate judges as against the one trial judge ought to overbalance it.

209. NEW EVIDENCE

A peculiar feature of admiralty appeals formerly was that an admiralty appeal was a new trial. An appeal from the district to the circuit court was like one from a magistrate in the state procedure—new witnesses could be examined, and the circuit court entered its own decree, and issued its own execution, instead of remanding the case to the district court for future proceedings.

Even an appeal from the Circuit to the Supreme Court was so far a new trial that additional witnesses could be examined, but the Supreme Court restricted this right by rule to evidence which could not have been produced in the lower courts, and required it to be taken by deposition. In other words, they discouraged the practice as much as possible on account of its obvious injustice and liability to abuse.[60]

The new appellate courts have adopted substantially the same doctrine. In case an appeal is taken up with a record

§ 209. [60] Mabey, 10 Wall. 419, 19 L. Ed. 963.

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not containing the evidence, they will not review the facts at all.[61]

It is still a new trial in its effect on the decree of the trial court—so far in fact that the appellate court can consider changes in fact and law arising after the decree.[62]

In the Glide,[63] a case was tried in the District Court of Maryland, the witnesses being examined ore tenus, but there was no rule in that district requiring their testimony to be taken down, and it was not taken down. The unsuccessful party appealed, and asked for a commission to retake his testimony for use on appeal. The court permitted it, on the ground that it was not his fault if the district court rule did not provide for such a case. The court, after arguing out his right to retake his testimony, ended its opinion by saying that the case must not be taken as a precedent, and any party who omitted or neglected to have his testimony taken down must suffer the consequences. So it sounds very much like a verdict of "Not guilty, but don't do it again."

The fact that there was no rule requiring it was not much of an excuse. In the common-law courts there is no rule or statute requiring evidence to be preserved for the purpose of preparing bills of exceptions, but the lawyer who gave that as an excuse for not setting out the evidence in his bill would receive scant consideration from a judge.

The well-known characteristics of sailor witnesses, and the utter lack of any check on them in case their testimony is not in black and white, especially after they have found out by hearing the arguments in the first trial how their

[61] Philadelphian, 60 Fed. 423, 9 C. C. A. 54.

[62] Hawkins, In re, 147 U. S. 486, 13 Sup. Ct. 512, 37 L. Ed. 251; Reid v. Fargo, 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156; Watts, Watts & Co. v. Unione Austriaca di Navigazione, 248 U. S. 9, 39 Sup. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323.

[63] 72 Fed. 200, 18 C. C. A. 504.

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case should be strengthened, render the procedure permitted in this case one of the gravest danger.[64]

Under the present law, the appellate court remands the case to the District Court for final action, instead of entering its own decree, as the old Circuit Court did.

[64] Taylor v. Harwood, Taney, 437, Fed. Cas. No. 13,794. In Nellson v. Coal, Cement & Supply Co., 122 Fed. 617, 60 C. C. A. 175, the same court and judge emphasized the necessity of having the testimony taken down in the trial court. See, also, McDonald, 112 Fed. 681, 50 C. C. A. 423.

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APPENDIX

1. The Mariner's Compass.
2. The Salvage Act of August 1, 1912.
3. Statutes Regulating Navigation, Including:
   (1) The International Rules.
   (2) The Rules for Coast and Connecting Inland Waters.
   (3) Lines between International and Inland Rules.
   (4) The Lake Rules.
   (5) The Mississippi Valley Rules.
   (6) The Act of March 3, 1899, as to Obstructing Channels.
   (7) The Stand-By Act of September 4, 1890.
4. The Limited Liability Acts Including:
   (1) The Act of March 3, 1851, as Amended.
   (2) The Act of June 26, 1884.
5. Section 941, Rev. St., as Amended, Regulating Release of Vessels from Arrest, on Bond or Stipulation.
6. Statutes Regulating Evidence in the Federal Courts.
7. The Handwriting Act of February 26, 1913.
8. Suits in Forma Pauperis.
9. Certain Admiralty Suits against the United States.
10. The Admiralty Rules of Practice.

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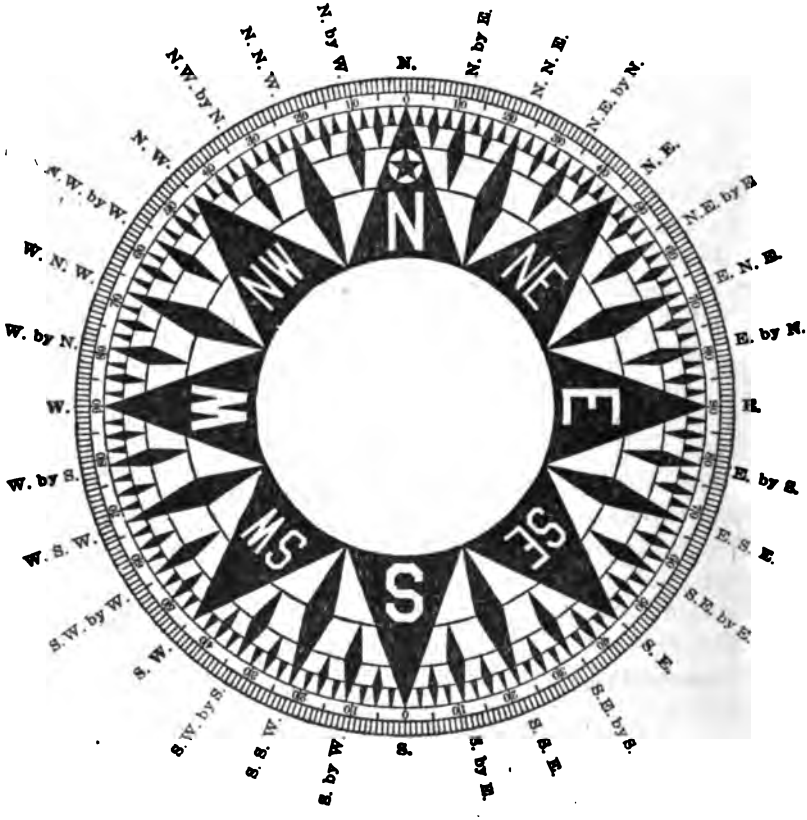
1. THE MARINER'S COMPASS



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2. THE SALVAGE ACT

ACT AUGUST 1, 1912 (37 Stat. 242, U. S. Comp. St. §§ 7990–7994).

An act to harmonize the national law of salvage with the provisions of the international convention for the unification of certain rules with respect to assistance and salvage at sea, and for other purposes.

Section 1. (U. S. Comp. St. § 7990.) **Salvage; remuneration not affected by ownership of vessel**—The right to remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services. (37 Stat. 242.)

Sec. 2. (U. S. Comp. St. § 7991.) **Assistance to be rendered by master; punishment for failure**—The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding one thousand dollars or imprisonment for a term not exceeding two years, or both. (37 Stat. 242.)

Sec. 3. (U. S. Comp. St. § 7992.) **Salvors of life to share in property saved**—Salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories. (37 Stat. 242.)

Sec. 4. (U. S. Comp. St. § 7993.) **Time limit for salvage suits**—A suit for the recovery of remuneration for rendering assistance or salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such

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period there had not been any reasonable opportunity of arresting the assisted or salved vessel within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business. (37 Stat. 242.)

Sec. 5. (U. S. Comp. St. § 7994.) **Act not applicable to ships of war, etc.**—Nothing in this Act shall be construed as applying to ships of war or to Government ships appropriated exclusively to a public service. (37 Stat. 242.)

3. STATUTES REGULATING NAVIGATION

(I) INTERNATIONAL RULES (26 Stat. 320, as amended, 28 Stat. 82, 29 Stat. 381, 885, 31 Stat. 30, and 34 Stat. 850 [U. S. Comp. St. §§ 7834–7871]).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Regulations for preventing collisions—The following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith, navigable by seagoing vessels. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 320, U. S. Comp. St. § 7834.)

PRELIMINARY

Meaning of words—In the following rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam, whether under sail or not, is to be considered a steam-vessel.

The word "steam-vessel" shall include any vessel propelled by machinery.

A vessel is "under way" within the meaning of these rules when she is not at anchor, or made fast to the shore, or aground. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 320, U. S. Comp. St. § 7835.)

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RULES CONCERNING LIGHTS, AND SO FORTH

Meaning of word "visible"—The word "visible" in these rules when applied to lights shall mean visible on a dark night with a clear atmosphere. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 321, U. S. Comp. § 7836.)

Article 1. Time for compliance with rules concerning lights—The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 321, U. S. Comp. St. § 7837.)

Art. 2. **Lights of steam vessels under way**—A steam-vessel when under way shall carry—(a) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than forty feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side,

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and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 321, U. S. Comp. St. § 7838.)

Art. 3. **Steam vessel towing another vessel or vessels**—A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than six feet apart, and when towing more than one vessel shall carry an additional bright white light six feet above or below such light, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a), excepting the additional light, which may be carried at a height of not less than fourteen feet above the hull.

Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 321, U. S. Comp. St. § 7839.)

Art. 4. **Vessel not under control, and telegraphic cable vessel**—(a) A vessel which from any accident is not under

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command shall carry at the same height as a white light mentioned in article two (a), where they can best be seen, and if a steam-vessel in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all around the horizon at a distance of at least two miles; and shall by day carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, two black balls or shapes, each two feet in diameter.

(b) A vessel employed in laying or in picking up a telegraph cable shall carry in the same position as the white light mentioned in article two (a), and if a steam-vessel in lieu of that light, three lights in a vertical line one over the other not less than six feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character as to be visible all around the horizon, at a distance of at least two miles. By day she shall carry in a vertical line, one over the other, not less than six feet apart, where they can best be seen, three shapes not less than two feet in diameter, of which the highest and lowest shall be globular in shape and red in color, and the middle one diamond in shape and white.

(c) The vessels referred to in this article, when not making way through the water, shall not carry the side-lights, but when making way shall carry them.

(d) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and can not therefore get out of the way.

These signals are not signals of vessels in distress and requiring assistance. Such signals are contained in article thirty-one. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 322, U. S. Comp. St. § 7840.)

Art. 5. **Sailing vessel under way and vessel in tow**—A sailing vessel under way and any vessel being towed shall

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carry the same lights as are prescribed by article two for a steam-vessel under way with the exception of the white lights mentioned therein, which they shall never carry. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 322, U. S. Comp. St. § 7841.)

Art. 6. **Small vessels under way in bad weather**—Whenever, as in the case of small vessels under way during bad weather, the green and red side-lights can not be fixed, these lights shall be kept at hand, lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides.

To make the use of these portable lights more certain and easy the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 322, U. S. Comp. St. § 7842.)

Art. 7. **Small vessels and rowing boats**—Steam vessels of less than forty, and vessels under oars or sails of less than twenty tons gross tonnage, respectively, and rowing boats, when under way, shall not be required to carry the lights mentioned in article two (a), (b), and (c), but if they do not carry them they shall be provided with the following lights:

First. Steam vessels of less than forty tons shall carry—

(a) In the fore part of the vessel, or on or in front of the funnel, where it can best be seen, and at a height above the gunwale of not less than nine feet, a bright white light constructed and fixed as prescribed in article two (a), and of such a character as to be visible at a distance of at least two miles.

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(b) Green and red side-lights constructed and fixed as prescribed in article two (b) and (c), and of such a character as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from right ahead to two points abaft the beam on their respective sides. Such lanterns shall be carried not less than three feet below the white light.

Second. Small steamboats, such as are carried by seagoing vessels, may carry the white light at a less height than nine feet above the gunwale, but it shall be carried above the combined lantern mentioned in subdivision one (b).

Third. Vessels under oars or sails of less than twenty tons shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

Fourth. Rowing boats, whether under oars or sail, shall have ready at hand a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision.

The vessels referred to in this article shall not be obliged to carry the lights prescribed by article four (a) and article eleven, last paragraph. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 322, amended Act May 28, 1894, c. 83, 28 Stat. 82, U. S. Comp. St. § 7843.)

Art. 8. **Pilot-vessel on and off pilotage duty**—Pilot vessels when engaged on their station on pilotage duty shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash

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or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side.

A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot-vessels when not engaged on their station on pilotage duty shall carry lights similar to those of other vessels of their tonnage. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 323, U. S. Comp. St. § 7844.)

Steam pilot vessel—A steam pilot vessel, when engaged on her station on pilotage duty and in waters of the United States, and not at anchor, shall, in addition to the lights required for all pilot boats, carry at a distance of eight feet below her white masthead light a red light, visible all around the horizon and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles, and also the colored side lights required to be carried by vessels when under way.

When engaged on her station on pilotage duty and in waters of the United States, and at anchor, she shall carry in addition to the lights required for all pilot boats the red light above mentioned, but not the colored side lights.

When not engaged on her station on pilotage duty, she shall carry the same lights as other steam vessels. (Act Feb. 19, 1900, c. 22, § 1, 31 Stat. 30, U. S. Comp. St. § 7845.)

Construction of preceding provision—This Act shall be construed as supplementary to article eight of the Act approved June seventh, eighteen hundred and ninety-seven, entitled "An Act to adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States," and to article eight of an Act approved

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August nineteenth, eighteen hundred and ninety, entitled "An Act to adopt regulations for preventing collisions at sea." (Act Feb. 19, 1900, c. 22, § 2, 31 Stat. 31, U. S. Comp. St. § 7846.)

Art. 9. **Fishing vessels and fishing boats**—Fishing vessels and fishing boats, when under way and when not required by this article to carry or show the lights hereinafter specified, shall carry or show the lights prescribed for vessels of their tonnage under way.

(a) Open boats, by which is to be understood boats not protected from the entry of sea water by means of a continuous deck, when engaged in any fishing at night, with outlying tackle extending not more than one hundred and fifty feet horizontally from the boat into the seaway, shall carry one all-round white light.

Open boats, when fishing at night, with outlying tackle extending more than one hundred and fifty feet horizontally from the boat into the seaway, shall carry one all-around white light, and in addition, on approaching or being approached by other vessels, shall show a second white light at least three feet below the first light and at a horizontal distance of at least five feet away from it in the direction in which the outlying tackle is attached.

(b) Vessels and boats, except open boats as defined in subdivision (a), when fishing with drift nets, shall, so long as the nets are wholly or partly in the water, carry two white lights where they can best be seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than fifteen feet, and so that the horizontal distance between them, measured in a line with the keel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be in the direction of the nets, and both of them shall be of such a character as to show all around the horizon, and to be visible at a distance of not less than three miles.

Within the Mediterranean Sea and in the seas bordering

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the coasts of Japan and Korea sailing fishing vessels of less than twenty tons gross tonnage shall not be obliged to carry the lower of these two lights. Should they, however, not carry it, they shall show in the same position (in the direction of the net or gear) a white light, visible at a distance of not less than one sea mile, on the approach of or to other vessels.

(c) Vessels and boats, except open boats as defined in subdivision (a), when line fishing with their lines out and attached to or hauling their lines, and when not at anchor or stationary within the meaning of subdivision (h), shall carry the same lights as vessels fishing with drift nets. When shooting lines, or fishing with towing lines, they shall carry the lights prescribed for a steam or sailing vessel under way, respectively.

Within the Mediterranean Sea and in the seas bordering the coasts of Japan and Korea sailing fishing vessels of less than twenty tons gross tonnage shall not be obliged to carry the lower of these two lights. Should they, however, not carry it, they shall show in the same position (in the direction of the lines) a white light, visible at a distance of not less than one sea mile on the approach of or to other vessels.

(d) Vessels when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—

First. If steam vessels, shall carry in the same position as the white light mentioned in article two (a) a tri-colored lantern so constructed and fixed as to show a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on each bow to two points abaft the beam on the starboard and port sides, respectively; and not less than six nor more than twelve feet below the tri-colored lantern a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all around the horizon.

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Second. If sailing vessels, shall carry a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all around the horizon, and shall also, on the approach of or to other vessels, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision.

All lights mentioned in subdivision (d) first and second shall be visible at a distance of at least two miles.

(e) Oyster dredges and other vessels fishing with dredge nets shall carry and show the same lights as trawlers.

(f) Fishing vessels and fishing boats may at any time use a flare-up light in addition to the lights which they are by this article required to carry and show, and they may also use working lights.

(g) Every fishing vessel and every fishing boat under one hundred and fifty feet in length, when at anchor, shall exhibit a white light visible all around the horizon at a distance of at least one mile.

Every fishing vessel of one hundred and fifty feet in length or upward, when at anchor, shall exhibit a white light visible all around the horizon at a distance of at least one mile, and shall exhibit a second light as provided for vessels of such length by article eleven.

Should any such vessel, whether under one hundred and fifty feet in length or of one hundred and fifty feet in length or upward, be attached to a net or other fishing gear, she shall on the approach of other vessels show an additional white light at least three feet below the anchor light, and at a horizontal distance of at least five feet away from it in the direction of the net or gear.

(h) If a vessel or boat when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall in daytime haul down the day signal required by subdivision (k); at night show the light or lights prescribed for a vessel at anchor; and during fog, mist, falling snow, or heavy rain storms make the signal

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prescribed for a vessel at anchor. (See subdivision (d) and the last paragraph of article fifteen.)

(i) In fog, mist, falling snow, or heavy rain storms, drift-net vessels attached to their nets, and vessels when trawling, dredging, or fishing with any kind of drag net, and vessels line fishing with their lines out, shall, if of twenty tons gross tonnage or upward, respectively, at intervals of not more than one minute make a blast; if steam vessels, with the whistle or siren, and if sailing vessels, with the foghorn, each blast to be followed by ringing the bell. Fishing vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals; but if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.

(k) All vessels or boats fishing with nets or lines or trawls, when under way, shall in daytime indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen. If vessels or boats at anchor have their gear out, they shall, on the approach of other vessels, show the same signal on the side on which those vessels can pass.

The vessels required by this article to carry or show the lights hereinbefore specified shall not be obliged to carry the lights prescribed by article four (a) and the last paragraph of article eleven. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 323, amended Act May 28, 1894, c. 83, 28 Stat. 82, and Act Jan. 19, 1907, c. 300, § 1, 34 Stat. 850, U. S. Comp. St. § 7847.)

Art. 10. **Vessel overtaken by another**—A vessel which is being overtaken by another shall show from her stern to such last mentioned vessel a white light or a flare-up light.

The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of

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twelve points of the compass, namely, for six points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side-lights. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 324, U. S. Comp. St. § 7848.)

Art. 11. **Vessel at anchor or aground in or near fair-way**—A vessel under one hundred and fifty feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile.

A vessel of one hundred and fifty feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.

A vessel aground in or near a fair-way shall carry the above light or lights and the two red lights prescribed by article four (a). (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 324, U. S. Comp. St. § 7849.)

Art. 12. **Additional flare-up light or detonating signal**—Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that can not be mistaken for a distress signal. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 325, U. S. Comp. St. § 7850.)

Art. 13. **Ships of war and convoys**—Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to

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additional station and signal-lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by ship-owners, which have been authorized by their respective Governments and duly registered and published. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 325, U. S. Comp. St. § 7851.)

Art. 14. **Steam vessels under sail only**—A steam-vessel proceeding under sail only but having her funnel up, shall carry in day-time, forward, where it can best be seen, one black ball or shape two feet in diameter. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 325, U. S. Comp. St. § 7852.)

Sound Signals for Fog, and so Forth

Art. 15. **Fog signals**—All signals prescribed by this article for vessels under way shall be given:

First. By "steam vessels" on the whistle or siren.

Second. By "sailing vessels" and "vessels towed" on the fog horn.

The words "prolonged blast" used in this article shall mean a blast of from four to six seconds duration.

A steam vessel shall be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn, to be sounded by mechanical means, and also with an efficient bell. (In all cases where the rules require a bell to be used a drum may be substituted on board Turkish vessels, or a gong where such articles are used on board small seagoing vessels.)

A sailing vessel of twenty tons gross tonnage or upward shall be provided with a similar fog horn and bell.

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely:

(a) A steam vessel having way upon her shall sound at intervals of not more than two minutes, a prolonged blast,

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(b) A steam vessel under way, but stopped, and having no way upon her, shall sound, at intervals of not more than two minutes, two prolonged blasts, with an interval of about one second between.

(c) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, one blast; when on the port tack, two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

(d) A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds.

(e) A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command or unable to maneuver as required by the rules, shall, instead of the signals prescribed in subdivisions (a) and (c) of this article, at intervals of not more than two minutes, sound three blasts in succession, namely: One prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

Sailing vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals, but, if they do not, they shall make some other efficient sound signal at intervals of not more than one minute. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 325, amended Act June 10, 1896, c. 401, § 1, 29 Stat. 381, U. S. Comp. St. § 7853.)

SPEED OF SHIPS TO BE MODERATE IN FOG, AND SO FORTH

Art. 16. **Speed of vessels in fog**—Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not as-

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certained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326, U. S. Comp. St. § 7854.)

STEERING AND SAILING RULES

Preliminary—Risk of Collision

Ascertainment of risk of collision—Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326, U. S. Comp. St. § 7855.)

Art. 17. **Rules of avoidance of risk; sailing vessels approaching one another**—When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326, U. S. Comp. St. § 7856.)

Art. 18. **Steam vessels meeting end on**—When two steam-vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to

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starboard, so that each may pass on the port side of the other.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the side-lights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326, U. S. Comp. St. § 7857.)

Art. 19. **Steam vessels crossing**—When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, U. S. Comp. St. § 7858.)

Art. 20. **Steam and sailing vessels meeting**—When a steam-vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing-vessel. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, U. S. Comp. St. § 7859.)

Art. 21. **What vessel shall keep her course**—Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

Note.—When, in consequence of thick weather or oth-

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er causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.) (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, amended Act May 28, 1894, c. 83, 28 Stat. 82, U. S. Comp. St. § 7860.)

Art. 22. **Vessel to avoid crossing ahead**—Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, U. S. Comp. St. § 7861.)

Art. 23. **Steam vessel to slacken speed**—Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, U. S. Comp. St. § 7862.)

Art. 24. **Overtaking vessel to keep out of the way; definition of "overtaking vessel"**—Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the

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way. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, U. S. Comp. St. § 7863.)

Art. 25. **Steam-vessel in narrow channel**—In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, U. S. Comp. St. § 7864.)

Art. 26. **Sailing-vessels under way to avoid fishing boats; fishing boats not to obstruct fair-ways**—Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing vessels or boats. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, U. S. Comp. St. § 7865.)

Art. 27. **Obedience to and construction of rules**—In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, U. S. Comp. St. § 7866.)

SOUND SIGNALS FOR VESSELS IN SIGHT OF ONE ANOTHER

Art. 28. **Meaning of "short blast"; steam-vessel under way to signal course by whistle; meaning of one, two, three "short blasts"**—The words "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam-vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."

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Three short blasts to mean, "My engines are going at full speed astern." (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 328, U. S. Comp. St. § 7867.)

No Vessel, Under any Circumstances, to Neglect Proper Precautions

Art. 29. **Vessels not to neglect precautions**—Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 328, U. S. Comp. St. § 7868.)

Reservation of Rules for Harbors and Inland Navigation

Art. 30. **Reservation of rules for harbors, rivers, and inland waters**—Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 328, U. S. Comp. St. § 7869.)

Distress Signals

Art. 31. **Distress signals, in day time; at night**—When a vessel is in distress and requires assistance from other vessels or from the shore the following shall be the signals to be used or displayed by her, either together or separately, namely:

In the daytime—

First. A gun or other explosive signal fired at intervals of about a minute.

Second. The international code signal of distress indicated by N. C.

Third. The distance signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball.

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Fourth. A continuous sounding with any fog-signal apparatus.

At night—

First. A gun or other explosive signal fired at intervals of about a minute.

Second. Flames on the vessel (as from a burning tar barrel, oil barrel, and so forth.)

Third. Rockets or shells throwing stars of any color or description, fired one at a time, at short intervals.

Fourth. A continuous sounding with any fog-signal apparatus. (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 328, amended Act May 28, 1894, c. 83, 28 Stat. 82, U. S. Comp. St. § 7870.)

Repeal—All laws or parts of laws inconsistent with the foregoing regulations for preventing collisions at sea for the navigation of all public and private vessels of the United States upon the high seas, and in all waters connected therewith navigable by sea-going vessels, are hereby repealed. (Act Aug. 19, 1890, c. 802, § 2, 26 Stat. 328, U. S. Comp. St. § 7871.)

(2) INLAND RULES (30 Stat. 96, as amended, 38 Stat. 381 [U. S. Comp. St. §§ 7872–7909]).

An act to adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States.

Whereas the provisions of chapter eight hundred and two of the Laws of eighteen hundred and ninety, and the amendments thereto, adopting regulations for preventing collisions at sea [i. e. International rules supra], apply to all waters of the United States connected with the high seas navigable by sea-going vessels, except so far as the navigation of any harbor, river, or inland waters is regulated by special rules duly made by local authority; and

Whereas it is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of

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the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, shall be stated in one act: Therefore,

Be it enacted by the senate and house of representatives of the United States of America in Congress assembled:

Regulations for preventing collisions in harbors and on inland waters—The following regulations for preventing collision shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and are hereby declared special rules duly made by local authority: (Act June 7, 1897, c. 4, § 1, 30 Stat. 96, U. S. Comp. St. § 7872.)

Preliminary

Meaning of words "sailing-vessel," "steam-vessel," and "under way"—In the following rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel.

The word "steam-vessel" shall include any vessel propelled by machinery.

A vessel is "under way," within the meaning of these rules, when she is not at anchor, or made fast to the shore, or aground. (Act June 7, 1897, c. 4, § 1, 30 Stat. 96, U. S. Comp. St. § 7873.)

Rules Concerning Lights, and so Forth

Meaning of word "visible"—The word "visible" in these rules, when applied to lights, shall mean visible on a dark night with a clear atmosphere. (Act June 7, 1897, c. 4, § 1, 30 Stat. 96, U. S. Comp. St. § 7874.)

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Art. 1. **Period of compliance with rules concerning lights**—The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited. (Act June 7, 1897, c. 4, § 1, 30 Stat. 96, U. S. Comp. St. § 7875.)

Art. 2. **Lights of steam-vessel under way**—A steam-vessel when under way shall carry—

(a) On or in front of the foremast, or, if a vessel without a foremast, then in the fore part of the vessel, a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A sea-going steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a).

These two lights shall be so placed in line with the keel

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that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

(f) All steam-vessels (except sea-going vessels and ferry-boats), shall carry in addition to green and red lights required by article two (b), (c), and screens as required by article two (d), a central range of two white lights; the after-light being carried at an elevation at least fifteen feet above the light at the head of the vessel. The head-light shall be so constructed as to show an unbroken light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after-light so as to show all around the horizon. (Act June 7, 1897, c. 4, § 1, 30 Stat. 96, U. S. Comp. St. § 7876.)

Art. 3. **Steam-vessel when towing another vessel or vessels**—A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than three feet apart, and when towing more than one vessel shall carry an additional bright white light three feet above or below such lights, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a) or the after range light mentioned in article two (f).

Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam. (Act June 7, 1897, c. 4, § 1, 30 Stat. 97, U. S. Comp. St. § 7877.)

Art. 5. **Sailing-vessel under way or in tow**—A sailing-vessel under way or being towed shall carry the same lights

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as are prescribed by article two for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry. (Act June 7, 1897, c. 4, § 1, 30 Stat. 97, U. S. Comp. St. § 7878.)

Art. 6. **Small vessel under way in bad weather**—Whenever, as in the case of vessels of less than ten gross tons under way during bad weather, the green and red side-lights can not be fixed, these lights shall be kept at hand, lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens. (Act June 7, 1897, c. 4, § 1, 30 Stat. 97, U. S. Comp St. § 7879.)

Art. 7. **Rowboats**—Rowing boats, whether under oars or sail, shall have ready at hand a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision. (Act June 7, 1897, c. 4, § 1, 30 Stat. 98, U. S. Comp. St. § 7880.)

Art. 8. **Pilot-vessels on and off pilotage duty**—Pilot-vessels when engaged on their station on pilotage duty shall not show the lights required for other vessels but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be

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shown on the port side nor the red light on the starboard side.

A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot-vessels, when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage. (Act June 7, 1897, c. 4, § 1, 30 Stat. 98, U. S. Comp. St. § 7881.)

Art. 9. **Small fishing-vessels**—(a) Fishing-vessels of less than ten gross tons, when under way and when not having their nets, trawls, dredges, or lines in the water, shall not be required to carry the colored side-lights; but every such vessel shall, in lieu thereof, have ready at hand a lantern with a green glass on one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

(b) All fishing-vessels and fishing-boats of ten gross tons or upward, when under way and when not having their nets, trawls, dredges, or lines in the water, shall carry and show the same lights as other vessels under way.

(c) All vessels, when trawling, dredging, or fishing with any kind of drag-nets or lines, shall exhibit, from some part of the vessel where they can be best seen, two lights. One of these lights shall be red and the other shall be white. The red light shall be above the white light, and shall be at a vertical distance from it of not less than six feet and not more than twelve feet; and the horizontal distance between them, if any, shall not be more than ten feet. These two lights shall be of such a character and contained in lanterns of such construction as to be visible all round the horizon,

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the white light a distance of not less than three miles and the red light of not less than two miles.

(d) Rafts, or other water craft not herein provided for, navigating by hand power, horse power, or by the current of the river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the Board of Supervising Inspectors of Steam Vessels. (Act June 7, 1897, c. 4, § 1, 30 Stat. 98, U. S. Comp. St. § 7882.)

Art. 10. **Vessel overtaken by another**—A vessel which is being overtaken by another, except a steam-vessel with an after range-light showing all around the horizon, shall show from her stern to such last-mentioned vessel a white light or a flare-up light. (Act June 7, 1897, c. 4, § 1, 30 Stat. 98, U. S. Comp. St. § 7883.)

Art. 11. **Vessel at anchor**—A vessel under one hundred and fifty feet in length when at anchor shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile.

A vessel of one hundred and fifty feet or upwards in length when at anchor shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry. (Act June 7, 1897, c. 4, § 1, 30 Stat. 98, U. S. Comp. St. § 7884.)

Art. 12. **Additional lights**—Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that can not be mis-

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taken for a distress signal. (Act June 7, 1897, c. 4, § 1, 30 Stat. 99, U. S. Comp. St. § 7885.)

Art. 13. **Ships of war and convoys**—Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by shipowners, which have been authorized by their respective Governments and duly registered and published. (Act June 7, 1897, c. 4, § 1, 30 Stat. 99, U. S. Comp. St. § 7886.)

Art. 14. **Steam-vessel under sail only**—A steam-vessel proceeding under sail only, but having her funnel up, may carry in daytime, forward, where it can best be seen, one black ball or shape two feet in diameter. (Act June 7, 1897, c. 4, § 1, 30 Stat. 99, U. S. Comp. St. § 7887.)

Sound Signals for Fog, and so Forth

Art. 15. **Fog signals**—All signals prescribed by this article for vessels under way shall be given:

1. By "steam-vessels" on the whistle or siren.

2. By "sailing-vessels" and "vessels towed" on the fog horn.

The words "prolonged blast" used in this article shall mean a blast of from four to six seconds duration.

A steam-vessel shall be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn; also with an efficient bell.

A sailing-vessel of twenty tons gross tonnage or upward shall be provided with a similar fog horn and bell.

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely:

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(a) A steam-vessel under way shall sound, at intervals of not more than one minute, a prolonged blast.

(c) A sailing-vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, one blast; when on the port tack, two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

(d) A vessel when at anchor shall, at intervals, of not more than one minute, ring the bell rapidly for about five seconds.

(e) A steam-vessel when towing, shall, instead of the signals prescribed in subdivision (a) of this article, at intervals of not more than one minute, sound three blasts in succession, namely, one prolonged blast followed by two short blasts.

A vessel towed may give this signal and she shall not give any other.

(f) All rafts or other water craft, not herein provided for, navigating by hand power, horse power, or by the current of the river, shall sound a blast of the fog-horn, or equivalent signal, at intervals of not more than one minute. (Act June 7, 1897, c. 4, § 1, 30 Stat. 99, U. S. Comp. St. § 7888.)

SPEED OF SHIPS TO BE MODERATE IN FOG, AND SO FORTH

Art. 16. **Speed of vessels in fog**—Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam-vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. (Act June 7, 1897, c. 4, § 1, 30 Stat. 99, U. S. Comp. St. § 7889.)

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STEERING AND SAILING RULES

Preliminary—Risk of Collision

Ascertainment of risk of collision—Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist. (Act June 7, 1897, c. 4, § 1, 30 Stat. 100, U. S. Comp. St. § 7890.)

Art. 17. **Rules of avoidance of risk; sailing-vessels approaching one another**—When two sailing-vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel. (Act June 7, 1897, c. 4, § 1, 30 Stat. 100, U. S. Comp. St. § 7891.)

Art. 18. **Steam-vessels meeting end on**—Rule I. When steam-vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other.

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But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.

The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own and by night to cases in which each vessel is in such a position as to see both the side-lights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Rule III. If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle.

Rule V. Whenever a steam-vessel is nearing a short bend or curve, in the channel, where, from the height of the banks or other cause, a steam-vessel approaching from the opposite direction can not be seen for a distance of half a mile, such steam vessel, when she shall have arrived within half a mile of such curve, or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by any approaching steam-vessel that may be within hearing. Should such signal be so answered by a steam-vessel upon the farther side of such

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bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly.

When steam-vessels are moved from their docks or berths, and other boats are liable to pass from any direction toward them, they shall give the same signal as in the case of vessels meeting at a bend, but immediately after clearing the berths so as to be fully in sight they shall be governed by the steering and sailing rules.

Rule VIII. When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals.

The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.

Rule IX. The whistle signals provided in the rules under this article, for steam-vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each can be determined in the day time by a sight of the vessel itself, or by night by seeing its signal lights.

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In fog, mist, falling snow or heavy rainstorms, when vessels can not so see each other, fog-signals only must be given. (Act June 7, 1897, c. 4, § 1, 30 Stat. 100, U. S. Comp. St. § 7892.)

Art. 19. **Steam-vessels crossing**—When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. (Act June 7, 1897, c. 4, § 1, 30 Stat. 101, U. S. Comp. St. § 7893.)

Art. 20. **Steam and sailing vessels meeting**—When a steam-vessel and a sailing-vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing-vessel. (Act June 7, 1897, c. 4, § 1, 30 Stat. 101, U. S. Comp. St. § 7894.)

Art. 21. **What vessel shall keep her course**—Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed. (Act June 7, 1897, c. 4, § 1, 30 Stat. 101, U. S. Comp. St. § 7895.)

Art. 22. **Vessel to avoid crossing ahead**—Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. (Act June 7, 1897, c. 4, § 1, 30 Stat. 101, U. S. Comp. St. § 7896.)

Art. 23. **Steam-vessels to slacken speed**—Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. (Act June 7, 1897, c. 4, § 1, 30 Stat. 101, U. S. Comp. St. § 7897.)

Art. 24. **Overtaking vessel to keep out of the way; definition of "overtaking vessel"**—Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either

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of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way. (Act June 7, 1897, c. 4, § 1, 30 Stat. 101, U. S. Comp. St. § 7898.)

Art. 25. **Steam-vessel in narrow channels**—In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel. (Act June 7, 1897, c. 4, § 1, 30 Stat. 101, U. S. Comp. St. § 7899.)

Art. 26. **Sailing-vessels under way to avoid fishing boats; fishing boats not to obstruct fair-ways**—Sailing-vessels under way shall keep out of the way of sailing-vessels or boats fishing with nets, or lines, or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing-vessels or boats. (Act June 7, 1897, c. 4, § 1, 30 Stat. 102, U. S. Comp. St. § 7900.)

Art. 27. **Obedience to and construction of rules**—In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (Act June 7, 1897, c. 4, § 1, 30 Stat. 102, U. S. Comp. St. § 7901.)

Sound Signals for Vessels in Sight of One Another

Art. 28. **Signal of steam-vessel going at full speed astern**—When vessels are in sight of one another a steam-vessel

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under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle. (Act June 7, 1897, c. 4, § 1, 30 Stat. 102, U. S. Comp. St. § 7902.)

No Vessel Under any Circumstances to Neglect Proper Precautions

Art. 29. **Vessels not to neglect precautions**—Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (Act June 7, 1897, c. 4, § 1, 30 Stat. 102, U. S. Comp. St. § 7903.)

Art. 30. **War and revenue vessels**—The exhibition of any light on board of a vessel of war of the United States or a revenue cutter may be suspended whenever, in the opinion of the Secretary of the Navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it. (Act June 7, 1897, c. 4, § 1, 30 Stat. 102, U. S. Comp. St. § 7904.)

Distress Signals

Art. 31. **Distress signals**—When a vessel is in distress and requires assistance from other vessels or from the shore the following shall be the signals to be used or displayed by her, either together or separately, namely:

In the Daytime

A continuous sounding with any fog-signal apparatus, or firing a gun.

At Night

First. Flames on the vessel as from a burning tar barrel, oil barrel, and so forth.

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Second. A continuous sounding with any fog-signal apparatus, or firing a gun. (Act June 7, 1897, c. 4, § 1, 30 Stat. 102, U. S. Comp. St. § 7905.)

Rules to be established for steam-vessels passing, and as to lights on ferry-boats, barges and canal boats in tow, and as to lights and day signals for vessels and dredges working on wrecks—The supervising inspectors of steam vessels and the Supervising Inspector General shall establish such rules to be observed by steam vessels in passing each other and as to the lights to be carried by ferry-boats and by barges and canal boats when in tow of steam vessels, and as to the lights and day signals to be carried by vessels, dredges of all types, and vessels working on wrecks by other obstruction to navigation or moored for submarine operations, or made fast to a sunken object which may drift with the tide or be towed, not inconsistent with the provisions of this Act, as they from time to time may deem necessary for safety, which rules when approved by the Secretary of Commerce are hereby declared special rules duly made by local authority, as provided for in article thirty of chapter eight hundred and two of the laws of eighteen hundred and ninety. Two printed copies of such rules shall be furnished to such ferryboats, barges, dredges, canal boats, vessels working on wrecks, and steam vessels, which rules shall be kept posted up in conspicuous places in such vessels, barges, dredges, and boats. (Act June 7, 1897, c. 4, § 2, 30 Stat. 102, amended Act May 25, 1914, c. 98, 38 Stat. 381, U. S. Comp. St. § 7906.)

Pilots violating provisions of act; penalty; liability of vessel or owner—Every pilot, engineer, mate, or master of any steam-vessel, and every master or mate of any barge or canal-boat, who neglects or refuses to observe the provisions of this Act, or the regulations established in pursuance of the preceding section, shall be liable to a penalty of fifty dollars, and for all damages sustained by any passenger in his person or baggage by such neglect or refusal:

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Provided, That nothing herein shall relieve any vessel, owner or corporation from any liability incurred by reason of such neglect or refusal. (Act June 7, 1897, c. 4, § 3, 30 Stat. 102, U. S. Comp. St. § 7907.)

Vessels navigated without compliance with act; penalty—Every vessel that shall be navigated without complying with the provisions of this Act shall be liable to a penalty of two hundred dollars, one-half to go to the informer, for which sum the vessel so navigated shall be liable and may be seized and proceeded against by action in any district court of the United States having jurisdiction of the offense. (Act June 7, 1897, c. 4, § 4, 30 Stat. 103, U. S. Comp. St. § 7908.)

Repeal—Sections forty-two hundred and thirty-three and forty-four hundred and twelve (with the regulations made in pursuance thereof, except the rules and regulations for the government of pilots of steamers navigating the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and except the rules for the Great Lakes and their connecting and tributary waters as far east as Montreal), and forty-four hundred and thirteen of the Revised Statutes of the United States, and chapter two hundred and two of the laws of eighteen hundred and ninety-three, and sections one and three of chapter one hundred and two of the laws of eighteen hundred and ninety-five, and sections five, twelve, and thirteen of the Act approved March third, eighteen hundred and ninety-seven, entitled "An Act to amend the laws relating to navigation," and all amendments thereto, are hereby repealed so far as the harbors, rivers, and inland waters aforesaid (except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico, and their tributaries) are concerned. (Act June 7, 1897, c. 4, § 5, 30 Stat. 103, U. S. Comp. St. § 7909.)

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(3) LINES BETWEEN INTERNATIONAL AND INLAND RULES

The following lines dividing the high seas from rivers, harbors, and inland waters are hereby designated and defined pursuant to section 2 of the act of Congress of February 19, 1895. Waters inshore of the lines here laid down are "inland waters," and upon them the inland rules and pilot rules made in pursuance thereof apply. Upon the high seas, viz, waters outside of the lines here laid down, the international rules apply.

Inland waters on the Atlantic, Pacific, and Gulf coasts of the United States where the Inland Rules of the Road are to be followed; and inland waters of the United States bordering on the Gulf of Mexico where the Inland Rules of the Road or Pilot Rules for Western Rivers are to be followed.

(All bearings are in degrees true and points magnetic; distance in nautical miles, and are given approximately.)

Cutler (Little River) Harbor, Me.—A line drawn from Long Point 226° (SW. by W. ⅞ W.) to Little River Head.

Little Machias Bay, Machias Bay, Englishman Bay, Chandler Bay, Moosabec Reach, Pleasant Bay, Narraguagus Bay, and Pigeon Hill Bay, Me.—A line drawn from Little River Head 232° (WSW. ⅜ W.) to the outer side of Old Man; thence 234° (WSW. ½ W.) to the outer side of Double Shot Islands; thence 244° (W. ⅝ S.) to Libby Islands Lighthouse; thence 231½° (WSW. ¼ W.) to Moose Peak Lighthouse; thence 232½° (WSW. ⅜ W.) to Little Pond Head; from Pond Point, Great Wass Island, 239° (W. by S.) to outerside of Crumple Island; thence 249° (W. ¼ S.) to Petit Manan Lighthouse.

All Harbors on the Coast of Maine, New Hampshire, and Massachusetts Between Petit Manan Lighthouse, Me., and Cape Ann Lighthouses, Mass.—A line drawn from Petit Manan Lighthouse 205½° (SW. ¼ S.), 26½ miles, to

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Mount Desert Lighthouse; thence 250½° (W. ⅛ S.), about 33 miles, to Matinicus Rock Lighthouses; thence 267½° (WNW. ¾ W.), 20 miles, to Monhegan Island Lighthouse; thence 260° (W. ⅝ N.), 19½ miles, to Seguin Lighthouse; thence 233° (WSW. ⅛ W.), 18¼ miles, to Portland Light Vessel; thence 214½° (SW. ⅜ W.), 29½ miles, to Boon Island Lighthouse; thence 210° (SW.), 11 miles, to Anderson Ledge Spindle, off Isles of Shoals Lighthouse; thence 176¼° (S. by W.), 19½ miles, to Cape Ann Lighthouses, Mass.

Boston Harbor.—From Eastern Point Lighthouse 215° (SW. ⅜ W.), 15¾ miles, to The Graves Lighthouse; thence 139¼° (SSE. ⅜ E.), 7½ miles, to Minots Ledge Lighthouse.

All Harbors in Cape Cod Bay, Mass.—A line drawn from Plymouth (Gurnet) Lighthouses 77½° (E. ⅛ S.), 16¼ miles, to Race Point Lighthouse.

Nantucket Sound, Vineyard Sound, Buzzards Bay, Narragansett Bay, Block Island Sound, and Easterly Entrance to Long Island Sound.—A line drawn from Chatham Lighthouses, Mass., 146° (S. by E. ¾ E.), 4⅜ miles, to Pollock Rip Slue Light Vessel; thence 142° (SSE. ⅛ E.), 12¾ miles, to Great Round Shoal Entrance Gas and Whistling Buoy (PS); thence 229° (SW. by W. ⅝ W.), 14½ miles, to Sankaty Head Lighthouse; from Smith Point, Nantucket Island, 261° (W. ⅜ N.), 27 miles, to No Mans Land Gas and Whistling Buoy, 2; thence 359° (N. by E. ⅛ E.), 8⅛ miles, to Gay Head Lighthouse; thence 250° (W. ⅝ S.), 34½ miles, to Block Island Southeast Lighthouse; thence 250½° (W. ⅝ S.), 14¾ miles, to Montauk Point Lighthouse, on the easterly end of Long Island, N. Y.

New York Harbor.—A line drawn from Rockaway Point Coast Guard Station 159½° (S. by E.), 6¼ miles, to Ambrose Channel Light Vessel; thence 238½° (WSW. ⅛ W.), 8¼ miles, to Navesink (southerly) Lighthouse.

Philadelphia Harbor and Delaware Bay.—A line drawn

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from Cape May Lighthouse 200° (SSW. ½ W.) 8½ miles, to Overfalls Light Vessel; thence 246¼° (WSW. ½ W.), 3⅛ miles, to Cape Henlopen Lighthouse.

Baltimore Harbor and Chesapeake Bay.—A line drawn from Cape Charles Lighthouse 179½° (S. ½ W.), 10½ miles, to Cape Henry Gas and Whistling Buoy, 2; thence 257° (W. ⅝ S.), 5 miles, to Cape Henry Lighthouse.

Charleston Harbor.—A line drawn from Ferris Wheel, on Isle of Palms, 154° (SSE. ¼ E.), 7 miles to Charleston Light Vessel; thence 259° (W. ⅞ S.), through Charleston Whistling Buoy, 6 C, 7⅝ miles, until Charleston Lighthouse bears 350° (N. ⅞ W.); thence 270° (W.), 2½ miles, to the beach of Folly Island.

Savannah Harbor and Calibogue Sound.—A line drawn from Braddock Point, Hilton Head Island, 150½° (SSE. ⅝ E.), 9¾ miles, to Tybee Gas and Whistling Buoy, T (PS); thence 270° (W.), to the beach of Tybee Island.

St. Simon Sound (Brunswick Harbor) and St. Andrew Sound.—From hotel on beach of St. Simon Island 15/16 mile 60° (NE. by E. ¼ E.) from St. Simon Lighthouse, 130° (SE. ½ E.), 6⅞ miles, to St. Simon Gas and Whistling Buoy (PS); thence 194° (S. by W. ⅛ W.), 8¾ miles, to St. Andrew Sound Bar Buoy (PS); thence 270° (W.), 4¾ miles, to the shore of Little Cumberland Island.

St. Johns River, Fla.—A straight line from the outer end of the northerly jetty to the outer end of the southerly jetty.

Florida Reefs and Keys.—A line drawn from the easterly end of the northerly jetty, at the entrance to the dredged channel ½ mile northerly of Norris Cut, 94° (E. ¼ S.), 1⅝ miles, to Florida Reefs North End Whistling Buoy, W (HS); thence 178° (S. ¼ E.), 8 miles, to Biscayne Bay Sea Bell Buoy, 1; thence 182° (S. ⅛ W.), 2⅜ miles, to Fowey Rocks Lighthouse; thence 188° (S. ⅝ W.), 6¾ miles, to Triumph Reef Beacon, O; thence 193° (S. by W.), 4½ miles, to Ajax Reef Beacon, M; thence 194° (S. by W.

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⅛ W.), 2 miles, to Pacific Reef Beacon, L; thence 196½° (S. by W. ⅜ W.), 5 miles, to Turtle Harbor Sea Buoy, 2; thence 210° (SSW. ½ W.), 4⅞ miles, to Carysfort Reef Lighthouse; thence 209½° (SSW. ½ W.), 5¾ miles, to Elbow Reef Beacon, J; thence 217½° (SW. ¾ S.), 9¾ miles, to Molasses Reef Gas Buoy, 2 M; thence 235½° (SW. ¾ W.), 6 miles, to Conch Reef Beacon, E; thence 234½° (SW. ¾ W.), through Crocker Reef Beacon, D, 10⅜ miles, to Alligator Reef Lighthouse; thence 234° (SW. ⅝ W.), 10⅞ miles, to Tennessee Reef Buoy, 4; thence 251° (WSW. ⅛ W.), 10½ miles, to Coffins Patches Beacon, C; thence 247° (SW. by W. ¾ W.), 8¾ miles, to Sombrero Key Lighthouse; hence 253½° (WSW. ⅜ W.), 16¾ miles, to Looe Key Beacon, 6; thence 257½° (WSW. ¾ W.), 6⅜ miles to American Shoal Lighthouse; thence 253½° (WSW. ⅜ W.), 2⅞ miles, to Maryland Shoal Beacon, S; thence 259° (WSW. ⅞ W.), 5¼ miles, to Eastern Sambo Beacon, A; thence 253° (WSW. ¼ W.), 2¼ miles, to Western Sambo Beacon, R; thence 257° (WSW. ⅝ W.), through Western Sambo Buoy, 2, 5½ miles, to Key West Entrance Gas Buoy (PS); thence 262° (W. ⅞ S.), 4¼ miles, to Sand Key Lighthouse; thence 261° (W. by S.), 2¾ miles, to Western Dry Rocks Beacon, 2; thence 268° (W. ⅜ S.), 3½ miles, through Satan Shoal Buoy (HS) to Vestal Shoal Buoy, 1; thence 274½° (W. ⅛ N.), 5¼ miles, to Coal Bin Rock Buoy, CB (HS); thence 324½° (NW. ⅝ N.), 7¼ miles, to Marquesas Keys left tangent; from northwesterly point Marquesas Keys 59° (NE. by E.), 4⅜ miles, to Bar Buoy, 1, Boca Grande Channel; thence 83° (E. ⅞ N.), 9¾ miles, to Northwest Channel Entrance Bell Buoy, 1, Northwest Channel into Key West; thence 68° (NE. by E. ⅞ E.), 23½ miles, to northerly side of Content Keys; thence 49° (NE. ¼ E.), 29 miles, to East Cape, Cape Sable.

Charlotte Harbor and Punta Gorda, Fla.—Eastward of Charlotte Harbor Entrance Gas and Bell Buoy (PS), off

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Boca Grande, and in Charlotte Harbor, in Pine Island Sound and Matlacha Pass. Pilot Rules for Western Rivers apply in Peace and Miakka Rivers north of a 250° and 70° (WSW. and ENE.) line through Mangrove Point Light; and in Caloosahatchee River northward of the steamboat wharf at Punta Rasa.

Tampa Bay and Tributaries, Fla.—From the southerly end of Long Key 245° (SW. by W. ⅝ W.), 9 miles, to Tampa Bay Gas and Whistling Buoy (PS); thence 129° (SE. ¾ E.), 6½ miles, to Bar Bell Buoy (PS), at the entrance to Southwest Channel; thence 103° (E. by S.), 2¾ miles, to the house on the north end of Anna Maria Key. Pilot Rules for Western Rivers apply in Manatee River inside Manatee River Entrance Buoy, 2; in Hillsboro Bay and River inside Hillsboro Bay Light, 2.

St. George Sound, Apalachicola Bay, Carrabelle and Apalachicola Rivers, and St. Vincent Sound, Fla.—North of a line from Lighthouse Point 246° (SW. by W. ⅝ W.), 13¼ miles, to southeasterly side of Dog Island; to northward of East Pass Bell Buoy, 1, at the entrance to East Pass, and inside West Pass Bell Buoy (PS) at the seaward entrance to West Pass. Pilot Rules for Western Rivers apply in Carrabelle River inside the entrance to the dredged channel; in Apalachicola River northward of Apalachicola Dredged Channel Entrance Buoy, 2.

Pensacola Harbor.—From Caucus Cut Entrance Gas and Whistling Buoy, 1A, 3° (N. ⅛ W.), tangent to easterly side of Fort Pickens, to the shore of Santa Rosa Island, and from the buoy northward in the buoyed channel through Caucus Shoal.

Mobile Harbor and Bay.—From Mobile Entrance Gas and Whistling Buoy (PS) 40° (NE. ⅞ N.) to shore of Mobile Point, and from the buoy 320° (NW.) to the shore of Dauphin Island. Pilot Rules for Western Rivers apply in Mobile River above Choctaw Point.

Sounds, Lakes, and Harbors on the Coasts of Alabama,

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Mississippi, and Louisiana, Between Mobile Bay Entrance and the Delta of the Mississippi River.—From Sand Island Lighthouse 259° (WSW. 5/8 W.), 43½ miles to Chandeleur Lighthouse; westward of Chandeleur and Errol Islands, and west of a line drawn from the southwesterly point of Errol Island 182° (S. ¼ E.), 23 miles, to Pass a Loutre Lighthouse. Pilot Rules for Western Rivers apply in Pascagoula River, and in the dredged cut at the entrance to the river, above Pascagoula River Entrance Light, A, marking the entrance to the dredged cut.

New Orleans Harbor and the Delta of the Mississippi River.—Inshore of a line drawn from the outermost mud lump showing above low water at the entrance to Pass a Loutre to a similar lump off the entrance to Northeast Pass; thence to a similar lump off the entrance to Southeast Pass; thence to the outermost aid to navigation off the entrance to South Pass; thence to the outermost aid to navigation off the entrance to Southwest Pass; thence northerly, about 19½ miles, to the westerly point of the entrance to Bay Jaque.

Sabine Pass, Tex.—Pilot Rules for Western Rivers apply to Sabine Pass northward of Sabine Pass Gas and Whistling Buoy (PS), and in Sabine Lake and its tributaries. Outside of this buoy the International Rules apply.

Galveston Harbor.—A line drawn from Galveston North Jetty Light 129° (SE. by E. ¼ E.), 2 miles to Galveston Bar Gas and Whistling Buoy (PS); thence 276° (W. 1/8 S.), 2¼ miles, to Galveston (S.) Jétty Lighthouse.

Brazos River, Tex.—Pilot Rules for Western Rivers apply in the entrance and river inside of Brazos River Entrance Gas and Whistling Buoy (PS). International Rules apply outside the buoy.

San Diego Harbor.—A line drawn from southerly tower of Coronado Hotel 208° (S. by W.), 5 miles, to Outside Bar Whistling Buoy, SD (PS); thence 345° (NNW. ¾ W.), 3⅝ miles, to Point Loma Lighthouse.

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San Francisco Harbor.—A line drawn through Mile Rocks Lighthouse 326° (NW. 5/8 W.) to Bonita Point Lighthouse.

Columbia River Entrance.—A line drawn from knuckle of Columbia River south jetty 351° (NNW. 7/8 W.) to Cape Disappointment Lighthouse.

Juan de Fuca Strait, Washington and Puget Sounds.—A line drawn from New Dungeness Lighthouse 13½° (N. by W.), 10⅜ miles, to Hein Bank Gas and Bell Buoy (HS); thence 337½° (NW. ¼ W.), 10¾ miles, to Lime Kiln Light, on west side of San Juan Island; from Bellevue Point, San Juan Island, 336½° (NW. ¼ W.) to Kellett Bluff, Henry Island; thence 347° (NW. 5/8 N.) to Turn Point Light; thence 71½° (NE. ⅛ E.), 8¼ miles, to westerly point of Skipjack Island; thence 38½° (N. by E. ¼ E.), 4⅜ miles, to Patos Islands Light; thence 338° (NW. ⅛ W.), 12 miles, to Point Roberts Light.

General Rule.—At all buoyed entrances from seaward to bays, sounds, rivers, or other estuaries for which specific lines have not been described, inland rules shall apply inshore of a line approximately parallel with the general trend of the shore, drawn through the outermost buoy or other aid to navigation of any system of aids.

(4) LAKE RULES (28 Stat. 645 [U. S. Comp. St. §§ 7910–7941]).

An act to regulate navigation on the Great Lakes and their connecting and tributary waters.

Preliminary

Rules for preventing collisions on the Great Lakes.—The following rules for preventing collisions shall be followed in the navigation of all public and private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645, U. S. Comp. St. § 7910.)

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Steam and Sail Vessels

Rule 1. **Meaning of words "sail-vessel," "steam-vessel," "under way"**—Every steam vessel which is under sail and not under steam, shall be considered a sail vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel. The word steam vessel shall include any vessel propelled by machinery. A vessel is under way within the meaning of these rules when she is not at anchor or made fast to the shore or aground. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645, U. S. Comp. St. § 7911.)

Lights

Rule 2. **Period of compliance with rules concerning lights; meaning of word "visible"**—The lights mentioned in the following rules and no others shall be carried in all weathers from sunset to sunrise. The word visible in these rules when applied to lights shall mean visible on a dark night with a clear atmosphere. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645, U. S. Comp. St. § 7912.)

Rule 3. **Lights of steam-vessel under way**—Except in the cases hereinafter expressly provided for, a steam vessel when under way shall carry:

(a) On or in front of the foremast, or if a vessel without a foremast, then in the forepart of the vessel, at a height above the hull of not less than twenty feet, and if the beam of the vessel exceeds twenty feet, then at a height above the hull not less than such beam, so, however, that such height need not exceed forty feet, a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such character as to be visible at a distance of at least five miles.

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(b) On the starboard side, a green light, so constructed as to throw an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side, a red light, so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A steamer of over one hundred and fifty feet register length shall also carry when under way an additional bright light similar in construction to that mentioned in subdivision (a), so fixed as to throw the light all around the horizon and of such character as to be visible at a distance of at least three miles. Such additional light shall be placed in line with the keel at least fifteen feet higher from the deck and more than seventy-five feet abaft the light mentioned in subdivision (a). (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645, U. S. Comp. St. § 7913.)

VESSELS TOWING

Rule 4. **Steam-vessel having a vessel in tow**—A steam vessel having a tow other than a raft shall in addition to the forward bright light mentioned in subdivision (a) of rule three carry in a vertical line not less than six feet above or below that light a second bright light of the same construction and character and fixed and carried in the same manner as the forward bright light mentioned in said subdivision (a) of rule three. Such steamer shall also car-

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ry a small bright light abaft the funnel or after mast for the tow to steer by, but such light shall not be visible forward of the beam. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 646, U. S. Comp. St. § 7914.)

Rule 5. **Steam-vessel having a raft in tow**—A steam vessel having a raft in tow shall, instead of the forward lights mentioned in rule four, carry on or in front of the foremast, or if a vessel without a foremast then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the beam of the vessel exceeds twenty feet, then at a height above the hull not less than such beam, so however that such height need not exceed forty feet, two bright lights in a horizontal line athwartships and not less than eight feet apart, each so fixed as to throw the light all around the horizon and of such character as to be visible at a distance of at least five miles. Such steamer shall also carry the small bright steering light aft, of the character and fixed as required in rule four. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 646, U. S. Comp. St. § 7915.)

Rule 6. **Sailing-vessel under way or vessel in tow**—A sailing vessel under way and any vessel being towed shall carry the side lights mentioned in rule three.

A vessel in tow shall also carry a small bright light aft, but such light shall not be visible forward of the beam. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 646, U. S. Comp. St. § 7916.)

Rule 7. **Rules to be made for tugs**—The lights for tugs under thirty tons register whose principal business is harbor towing, and for boats navigating only on the River Saint Lawrence, also ferryboats, rafts, and canal boats, shall be regulated by rules which have been or may hereafter be prescribed by the Board of Supervising Inspectors of Steam Vessels. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 646, U. S. Comp. St. § 7917.)

Rule 8. **Small vessel may use portable lights**—Whenever, as in the case of small vessels under way during bad weath-

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er, the green and red side lights can not be fixed, these lights shall be kept at hand lighted and ready for use, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 646, U. S. Comp. St. § 7918.)

Rule 9. **Vessel at anchor**—A vessel under one hundred and fifty feet register length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern constructed so as to show a clear, uniform, and unbroken light, visible all around the horizon, at a distance of at least one mile.

A vessel of one hundred and fifty feet or upward in register length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 647, U. S. Comp. St. § 7919.)

Rule 10. **Produce and canal boats**—Produce boats, canal boats, fishing boats, rafts, or other water craft navigating any bay, harbor, or river by hand power, horse power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not otherwise provided for in these rules, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the Board

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of Supervising Inspectors of Steam Vessels. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 647, U. S. Comp. St. § 7920.)

Rule 11. **Open boats**—Open boats shall not be obliged to carry the side lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on one side and a red slide on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white light. They shall not, however, be prevented from using a flare-up in addition if considered expedient. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 647, U. S. Comp. St. § 7921.)

Rule 12. **Use of torch**—Sailing vessels shall at all times, on the approach of any steamer during the nighttime, show a lighted torch upon that point or quarter to which such steamer shall be approaching. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 647, U. S. Comp. St. § 7922.)

Rule 13. **War and revenue ships**—The exhibition of any light on board of a vessel of war or revenue cutter of the United States may be suspended whenever, in the opinion of the Secretary of the Navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 647, U. S. Comp. St. § 7923.)

Fog Signals

Rule 14. **Fog signals of steam-vessels and sailing-vessels under way and at anchor**—A steam vessel shall be provided with an efficient whistle, sounded by steam or by some substitute for steam, placed before the funnel not less than eight feet from the deck, or in such other place as the local inspectors of steam vessels shall determine, and of such character as to be heard in ordinary weather at a distance

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of at least two miles, and with an efficient bell, and it is hereby made the duty of the United States local inspectors of steam vessels when inspecting the same to require each steamer to be furnished with such whistle and bell. A sailing vessel shall be provided with an efficient fog horn and with an efficient bell.

Whenever there is thick weather by reason of fog, mist, falling snow, heavy rainstorms, or other causes, whether by day or by night, fog signals shall be used as follows:

(a) A steam vessel under way, excepting only a steam vessel with a raft in tow, shall sound at intervals of not more than one minute three distinct blasts of her whistle.

(b) Every vessel in tow of another vessel shall, at intervals of one minute, sound four bells on a good and efficient and properly-placed bell as follows: By striking the bell twice in quick succession, followed by a little longer interval, and then again striking twice in quick succession (in the manner in which four bells is struck in indicating time).

(c) A steamer with a raft in tow shall sound at intervals of not more than one minute a screeching or Modoc whistle for from three to five seconds.

(d) A sailing vessel under way and not in tow shall sound at intervals of not more than one minute—

If on the starboard tack with wind forward of abeam, one blast of her fog horn;

If on the port tack with wind forward of the beam, two blasts of her fog horn;

If she has the wind abaft the beam on either side, three blasts of her fog horn.

(e) Any vessel at anchor and any vessel aground in or near a channel or fairway shall at intervals of not more than two minutes ring the bell rapidly for three to five seconds.

(f) Vessels of less than ten tons registered tonnage, not being steam vessels, shall not be obliged to give the above-

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mentioned signals, but if they do not they shall make some other efficient sound signal at intervals of not more than one minute.

(g) Produce boats, fishing boats, rafts, or other water craft navigating by hand power or by the current of the river, or anchored or moored in or near the channel or fairway and not in any port, and not otherwise provided for in these rules, shall sound a fog horn or equivalent signal, at intervals of not more than one minute. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 647, U. S. Comp. St. § 7924.)

Rule 15. **Reduced speed in thick weather**—Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 648, U. S. Comp. St. § 7925.)

Steering and Sailing Rules

Sailing-Vessels

Rule 16. **Avoidance of risk of collision; sailing-vessels approaching one another**—When two sailing vessels are approaching one another so as to involve risk of collision one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is closehauled.

(b) A vessel which is closehauled on the port tack shall keep out of the way of a vessel which is closehauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When they are running free, with the wind on the

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same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 648, U. S. Comp. St. § 7926.)

Steam-Vessels

Rule 17. **Steam-vessels meeting end on**—When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision each shall alter her course to starboard, so that each shall pass on the port side of the other. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 648, U. S. Comp. St. § 7927.)

Rule 18. **Steam-vessels crossing**—When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 648, U. S. Comp. St. § 7928.)

Rule 19. **Steam and sailing vessels meeting**—When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision the steam vessel shall keep out of the way of the sailing vessel. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 648, U. S. Comp. St. § 7929.)

Rule 20. **What vessel shall keep her course**—Where, by any of the rules herein prescribed, one of two vessels shall keep out of the way, the other shall keep her course and speed. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649, U. S. Comp. St. § 7930.)

Rule 21. **What vessel to slacken speed**—Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649, U. S. Comp. St. § 7931.)

Rule 22. **Overtaking vessel to keep out of the way**—Notwithstanding anything contained in these rules every vessel overtaking any other shall keep out of the way of the overtaken vessel. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649, U. S. Comp. St. § 7932.)

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Rule 23. **Whistle signals; one blast, two blasts**—In all weathers every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied whenever required by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or, as provided in Rule Twenty-six:

One blast to mean, "I am directing my course to starboard."

Two blasts to mean, "I am directing my course to port." But the giving or answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649, U. S. Comp. St. § 7933.)

Rule 24. **Vessels in rivers Saint Mary and Saint Clair**—That in all narrow channels where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649, U. S. Comp. St. § 7934.)

Rule 25. **Vessels in narrow channels**—In all channels less than five hundred feet in width, no steam vessel shall pass another going in the same direction unless the steam vessel ahead be disabled or signify her willingness that the steam vessel astern shall pass, when the steam vessel astern may pass, subject, however, to the other rules applicable to such a situation. And when steam vessels proceeding in opposite directions are about to meet in such channels, both such vessels shall be slowed down to a moderate speed, according to the circumstances. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649, U. S. Comp. St. § 7935.)

Rule 26. **Refusal to pass**—If the pilot of a steam vessel

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to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649, U. S. Comp. St. § 7936.)

Rule 27. **Obedience to and construction of rules**—In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649, U. S. Comp. St. § 7937.)

Rule 28. **Vessels not to neglect precautions**—Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649, U. S. Comp. St. § 7938.)

Violations of provisions of act; penalty—A fine, not exceeding two hundred dollars, may be imposed for the violation of any of the provisions of this Act. The vessel shall be liable for the said penalty, and may be seized and proceeded against, by way of libel, in the district court of the United States for any district within which such vessel may be found. (Act Feb. 8, 1895, c. 64, § 2, 28 Stat. 649, U. S. Comp. St. § 7939.)

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Regulations; steam-vessels passing; copies of rules—The Secretary of the Treasury of the United States shall have authority to establish all necessary regulations, not inconsistent with the provisions of this Act, required to carry the same into effect.

The Board of Supervising Inspectors of the United States shall have authority to establish such regulations to be observed by all steam vessels in passing each other, not inconsistent with the provisions of this Act, as they shall from time to time deem necessary; and all regulations adopted by the said Board of Supervising Inspectors under the authority of this Act, when approved by the Secretary of the Treasury, shall have the force of law. Two printed copies of any such regulations for passing, signed by them, shall be furnished to each steam vessel, and shall at all times be kept posted up in conspicuous places on board. (Act Feb. 8, 1895, c. 64, § 3, 28 Stat. 649, U. S. Comp. St. § 7940.)

Repeal—That all laws or parts of laws, so far as applicable to the navigation of the Great Lakes and their connecting and tributary waters as far east as Montreal, inconsistent with the foregoing rules are hereby repealed. (Act Feb. 8, 1895, c. 64, § 4, 28 Stat. 650, U. S. Comp. St. § 7941.)

(5) MISSISSIPPI VALLEY RULES (Rev. St. § 4233, as amended [U. S. Comp. St. §§ 7942–7974]).

Rules for preventing collisions—The following rules for preventing collisions on the water, shall be followed in the navigation of vessels of the Navy and of the mercantile marine of the United States. (R. S. § 4233, U. S. Comp. St. § 7942.)

STEAM AND SAIL VESSELS

Rule 1. **Meaning of words "sail vessel" and "steam vessel"**—Every steam vessel which is under sail and not under steam shall be considered a sail vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel. The words steam ves-

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sel shall include any vessel propelled by machinery. (R. S. § 4233, amended Act March 3, 1905, c. 1457, § 10, 33 Stat. 1032, U. S. Comp. St. § 7943.)

LIGHTS

Rule 2. **Period of compliance with rules concerning lights**—The lights mentioned in the following rules, and no others, shall be carried in all weathers, between sunset and sunrise. (R. S. § 4233, U. S. Comp. St. § 7944.)

Rule 3. **Lights of ocean steamers, and steamers carrying sail, under way**—All ocean-going steamers, and steamers carrying sail, shall, when under way, carry—

(a) At the foremast head, a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side.

(b) On the starboard side, a green light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

(c) On the port side, a red light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the port side.

The green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the

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lights, so as to prevent them from being seen across the bow. (R. S. § 4233, U. S. Comp. St. § 7945.)

Rule 4. **Steam-vessel towing other vessels**—Steam-vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side-lights, so as to distinguish them from other steam-vessels. Each of these mast-head lights shall be of the same character and construction as the mast-head lights prescribed by Rule three. (R. S. § 4233, U. S. Comp. St. § 7946.)

Rule 5. **Steam-vessels other than ocean steamers, and steamers carrying sail**—All steam-vessels, other than ocean-going steamers and steamers carrying sail, shall, when under way, carry on the starboard and port sides lights of the same character and construction and in the same position as are prescribed for side-lights by Rule three, except in the case provided in Rule six. (R. S. § 4233, U. S. Comp. St. § 7947.)

Rule 6. **Vessels on waters flowing into Gulf of Mexico**—River-steamers navigating waters flowing into the Gulf of Mexico, and their tributaries, shall carry the following lights, namely: One red light on the outboard side of the port smoke-pipe, and one green light on the outboard side of the starboard smoke-pipe. Such lights shall show both forward and abeam on their respective sides. (R. S. § 4233, U. S. Comp. St. § 7948.)

Rule 7. **Coasting and inland waters steam-vessels, ferry-boats, barges and canal-boats**—All coasting steam-vessels, and steam-vessels other than ferry-boats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers, or other inland waters of the United States, except those mentioned in Rule six, shall carry the red and green lights, as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights; the after-light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The headlight shall be so constructed as to show a good light through twenty points

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of the compass, namely: from right ahead to two points abaft the beam on either side of the vessel; and the after-light so as to show all around the horizon. The lights for ferry-boats, barges and canal boats when in tow of steam vessels, shall be regulated by such rules as the board of supervising inspectors of steam-vessels shall prescribe. (R. S. § 4233, amended Act March 3, 1893, c. 202, and Act March 3, 1893, c. 202, 27 Stat. 557, U. S. Comp. St. § 7949.)

Rule 8. **Sailing-vessels under way or in tow**—Sail-vessels, under way or being towed, shall carry the same lights as steam-vessels under way, with the exception of the white mast-head lights, which they shall never carry. (R. S. § 4233, U. S. Comp. St. § 7950.)

Rule 9. **Small vessels in bad weather**—Whenever, as in case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens. (R. S. § 4233, U. S. Comp. St. § 7951.)

Rule 10. **Vessels at anchor**—All vessels, whether steam-vessels or sail-vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile. (R. S. § 4233, U. S. Comp. St. § 7952.)

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Rule 11. **Sailing and steam pilot-vessels**—Sailing pilot-vessels shall not carry the lights required for other sailing-vessels, but shall carry a white light at the mast-head, visible all around the horizon, and shall also exhibit a flare-up light every fifteen minutes.

Steam pilot boats shall, in addition to the masthead light and green and red side lights required for ocean steam vessels, carry a red light hung vertically from three to five feet above the foremast headlight, for the purpose of distinguishing such steam pilot boats from other steam vessels. (R. S. § 4233, amended Act March 3, 1897, c. 389, § 5, 29 Stat. 689, U. S. Comp. St. § 7953.)

Rule 12. **Coal and trading boats**—Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam-vessels. (R. S. § 4233, U. S. Comp. St. § 7954.)

Rule 13. **Open boats**—Open boats shall not be required to carry the side-lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on one side and a red slide on the other side; and, on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white light. They shall not, however, be prevented from using a flare-up, in addition, if considered expedient. (R. S. § 4233, U. S. Comp. St. § 7955.)

Rule 14. **Ships of war and revenue cutters**—The exhibition of any light on board of a vessel of war of the United

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States may be suspended whenever, in the opinion of the Secretary of the Navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it. The exhibition of any light on board of a revenue cutter of the United States may be suspended whenever, in the opinion of the commander of the vessel, the special character of the service may require it. (R. S. § 4233, amended, Act March 3, 1897, c. 389, § 12, 29 Stat. 690, U. S. Comp. St. § 7956.)

Fog Signals

Rule 15. **Fog signals**—(a) Whenever there is a fog, or thick weather, whether by day or night, fog signals shall be used as follows: Steam vessels under way shall sound a steam whistle placed before the funnel, not less than eight feet from the deck, at intervals of not more than one minute. Steam vessels, when towing, shall sound three blasts of quick succession repeated at intervals of not more than one minute.

(b) Sail vessels under way shall sound a fog horn at intervals of not more than one minute.

(c) Steam vessels and sail vessels, when not under way, shall sound a bell at intervals of not more than two minutes.

(d) Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not in any port, shall sound a fog-horn, or equivalent signal, which shall make a sound equal to a steam-whistle, at intervals of not more than two minutes. (R. S. § 4233, amended Act March 3, 1897, c. 389, § 12, 29 Stat. 690, U. S. Comp. St. § 7957.)

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STEERING AND SAILING RULES

Rule 16. **Ascertainment of risk of collision**—Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change such risk should be deemed to exist. (R. S. § 4233, amended Act March 3, 1897, c. 389, § 12, 29 Stat. 690, U. S. Comp. St. § 7958.)

Rule 17. **Rules of avoidance of risk; sailing-vessels approaching one another**—When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both vessels are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel. (R. S. § 4233, amended Act March 3, 1897, c. 389, § 12, 29 Stat. 690, U. S. Comp. St. § 7959.)

Rule 18. **Steam-vessels meeting end on**—If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other. (R. S. § 4233, U. S. Comp. St. § 7960.)

Rule 19. **Steam-vessels crossing**—If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep

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out of the way of the other. (R. S. § 4233, U. S. Comp. St. § 7961.)

Rule 20. **Steam and sailing vessels meeting**—If two vessels, one of which is a sail-vessel and the other a steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel. (R. S. § 4233, U. S. Comp. St. § 7962.)

Rule 21. **Speed of steam-vessel approaching another vessel and in fog**—Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed. (R. S. § 4233, U. S. Comp. St. § 7963.)

Rule 22. **Overtaking vessel to keep out of the way**—Every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel. (R. S. § 4233, U. S. Comp. St. § 7964.)

Rule 23. **What vessel shall keep her course**—Where, by Rules seventeen, nineteen, twenty, and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of Rule twenty-four. (R. S. § 4233, U. S. Comp. St. § 7965.)

Rule 24. **Obedience to and construction of rules**—In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger. (R. S. § 4233, U. S. Comp. St. § 7966.)

Rule 25. **Sailing-vessel overtaken**—A sail vessel which is being overtaken by another vessel during the night shall show from her stern to such last-mentioned vessel a torch or a flare-up light. (R. S. § 4233, amended Act March 3, 1897, c. 389, § 13, 29 Stat. 690, U. S. Comp. St. § 7967.)

Rule 26. **Vessels not to neglect precautions**—Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neg-

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lect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. (R. S. § 4233, amended Act March 3, 1897, c. 389, § 13, 29 Stat. 690, U. S. Comp. St. § 7968.)

Regulations of towage of seagoing barges within inland waters—The chairman of the Light-House Board, the Supervising Inspector-General of the Steamboat-Inspection Service, and the Commissioner of Navigation shall convene as a board at such times as the Secretary of Commerce and Labor shall prescribe to prepare regulations limiting the length of hawsers between towing vessels and seagoing barges in tow and the length of such tows within any of the inland waters of the United States designated and defined from time to time pursuant to section two of the Act approved February nineteenth, eighteen hundred and ninety-five, and such regulations when approved by the Secretary of Commerce and Labor shall have the force of law. (Act May 28, 1908, c. 212, § 14, 35 Stat. 428, U. S. Comp. St. § 7969.)

Violation of regulations by master of towing vessel; penalty—The master of the towing vessel shall be liable to the suspension or revocation of his license for any willful violation of regulations issued pursuant to section fourteen in the manner now prescribed for incompetency, misconduct, or unskillfulness. (Act May 28, 1908, c. 212, § 15, 35 Stat. 429, U. S. Comp. St. § 7970.)

Rules for preventing collisions extended to harbors—On and after March first, eighteen-hundred and ninety-five, the provisions of sections forty-two hundred and thirty-three, forty-four hundred and twelve, and forty-four hundred and thirteen of the Revised Statutes and regulations pursuant thereto shall be followed on the harbors, rivers and inland waters of the United States. The provisions of said sections of the Revised Statutes and regulations pursuant

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thereto are hereby declared special rules duly made by local authority relative to the navigation of harbors, rivers and inland waters as provided for in Article thirty, of the Act of August nineteenth, eighteen hundred and ninety, entitled "An Act to adopt regulations for preventing collisions at sea." (Act Feb. 19, 1895, c. 102, § 1, 28 Stat. 672, U. S. Comp. St. § 7971.)

Secretary of Treasury to define lines dividing high seas from rivers and harbors—The Secretary of the Treasury is hereby authorized, empowered and directed from time to time to designate and define by suitable bearing or ranges with light houses, light vessels, buoys or coast objects, the lines dividing the high seas from rivers, harbors and inland waters. (Act Feb. 19, 1895, c. 102, § 2, 28 Stat. 672, U. S. Comp. St. § 7972.)

Signal lights; penalty for violation—Collectors or other chief officers of the customs shall require all sail vessels to be furnished with proper signal lights. Every such vessel that shall be navigated without complying with the Statutes of the United States, or the regulations that may be lawfully made thereunder, shall be liable to a penalty of two hundred dollars, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense. (Act Feb. 19, 1895, c. 102, § 3, 28 Stat. 672, U. S. Comp. St. § 7973.)

Inland waters defined—The words "inland waters" used in this Act shall not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal; and this Act shall not in any respect modify or affect the provisions of the Act entitled "An Act to regulate navigation of the Great Lakes and their connecting and tributary waters," approved February eighth, eighteen hundred and ninety-five. (Act Feb. 19, 1895, c. 102, § 4, 28 Stat. 672, U. S. Comp. St. § 7974.)

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(6) ACT MARCH 3, 1899 (30 Stat. 1152 [U. S. Comp. St. §§ 9920, 9921, 9924, 9925]).

Obstructions by vessels, anchored or sunk, and floating timber; marking and removal of sunken vessels—It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidently or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for. (Act March 3, 1899, c. 425, § 15, 30 Stat. 1152, U. S. Comp. St. § 9920.)

Penalty for violation of provisions of act—Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such

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fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section thirteen of this Act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of War, or who shall willfully injure or destroy any work of the United States contemplated in section fourteen of this Act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this Act, shall be deemed guilty of a violation of this Act, and shall upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections thirteen, fourteen and fifteen of this Act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof. (Act March 3, 1899, c. 425, § 16, 30 Stat. 1153, U. S. Comp. St. § 9921.)

Removal of obstructions to navigation; notice; proposals to remove; bond of bidder; disposition of proceeds—Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water

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craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same: Provided, That in his discretion, the Secretary of War may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: And provided also, That the Secretary of War may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: Provided, That such bidder shall give satisfactory security to execute the work: Provided further, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States. (Act March 3, 1899, c. 425, § 19, 30 Stat. 1154, U. S. Comp. St. § 9924.)

Destruction of certain vessels grounding; appropriation; repeal—Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or

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grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section nineteen, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of War, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of War or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: Provided, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: And provided further, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

Such sum of money as may be necessary to execute this section and the preceding section of this Act is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be paid out on the requisition of the Secretary of War.

That all laws or parts of laws inconsistent with the foregoing sections nine to twenty, inclusive, of this Act are hereby repealed: Provided, That no action begun or right of action accrued prior to the passage of this Act shall be affected by this repeal: Provided further, That nothing con-

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tained in the said foregoing sections shall be construed as repealing, modifying, or in any manner affecting the provisions of an Act of Congress approved June twenty-ninth, eighteen hundred and eighty-eight, entitled "An Act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City, by dumping or otherwise, and to punish and prevent such offense" as amended by section three of the river and harbor Act of August eighteenth, eighteen hundred and ninety-four. (Act March 3, 1899, c. 425, § 20, 30 Stat. 1154, amended Act Feb. 20, 1900, c. 23, § 3, 31 Stat. 32, and Act June 13, 1902, c. 1079, § 12, 32 Stat. 375, U. S. Comp. St. § 9925.)

(7) STAND-BY ACT OF SEPTEMBER 4, 1890 (26 Stat. 425 [U. S. Comp. St. §§ 7979, 7980]).

An act in regard to collision at sea.

Section 1. **Duties of master of vessel in case of collision** —In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default. (Act Sept. 4, 1890, c. 875, § 1, 26 Stat. 425, U. S. Comp. St. § 7979.)

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Sec. 2. **Failure to comply with act; penalty**—Every master or person in charge of a United States vessel who fails without reasonable cause, to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of one thousand dollars, or imprisonment for a term not exceeding two years; and for the above sum the vessel shall be liable and may be seized and proceeded against by process in any district court of the United States by any person; one-half such sum to be payable to the informer and the other half to the United States. (Act Sept. 4, 1890, c. 875, § 2, 26 Stat. 425, U. S. Comp. St. § 7980.)

4. THE LIMITED LIABILITY ACTS

(1) ACT MARCH 3, 1851 (Rev. St. §§ 4282–4289, as amended February 27, 1877, February 18, 1875, and June 19, 1886 [U. S. Comp. St. §§ 8020–8027]).

Loss by fire—No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.. (R. S. § 4282, U. S. Comp. St. § 8020.)

Liability of owner not to exceed interest—The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. (R. S. § 4283, U. S. Comp. St. § 8021.)

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Apportionment of compensation—Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. (R. S. § 4284, amended Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 251, U. S. Comp. St. § 8022.)

Transfer of interest of owner to trustee—It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease. (R. S. § 4285, U. S. Comp. St. § 8023.)

When charterer is deemed owner—The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. (R. S. § 4286, U. S. Comp. St. § 8024.)

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Remedies reserved—Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. (R. S. § 4287, U. S. Comp. St. § 8025.)

Shipping inflammable materials—Any person shipping oil of vitriol, unslaked lime, inflammable matches, or gunpowder, in a vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars. But this section shall not apply to any vessel of any description whatsoever used in rivers or inland navigation. (R. S. § 4288, U. S. Comp. St. § 8026.)

Limitation of liability of owners applied to all vessels—The provisions of the seven preceding sections, and of section eighteen of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canalboats, barges, and lighters. (R. S. § 4289, amended Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 320, and Act June 19, 1886, c. 421, § 4, 24 Stat. 80, U. S. Comp. St. § 8027.)

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(2) ACT JUNE 26, 1884, § 18 (U. S. Comp. St. § 8028).

Liability of owners of vessels for debts limited—The individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners. (Act June 26, 1884, c. 121, § 18, 23 Stat. 57, U. S. Comp. St. § 8028.)

5. BONDS OR STIPULATIONS TO RELEASE VESSELS FROM ARREST

REV. ST. § 941, AS AMENDED (U. S. Comp. St. § 1567).

An act to amend section nine hundred and forty-one of the Revised Statutes.

Delivery bond in admiralty proceedings—When a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libelant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause. And the owner of

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any vessel may cause to be executed and delivered to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the court in which he is marshal, conditioned to answer the decree of said court in all or any cases that shall thereafter be brought in said court against the said vessel, and thereupon the execution of all such process against said vessel shall be stayed so long as the amount secured by such bond or stipulation shall be at least double the aggregate amount claimed by the libelants in such suits which shall be begun and pending against said vessel; and like judgments and remedies may be had on said bond or stipulation as if a special bond or stipulation had been filed in each of said suits. The court may make such orders as may be necessary to carry this section into effect, and especially for the giving of proper notice of any such suit. Such bond or stipulation shall be indorsed by the clerk with a minute of the suits wherein process is so stayed, and further security may at any time be required by the court. If a special bond or stipulation in the particular cause shall be given under this section, the liability as to said cause on the general bond or stipulation shall cease. (R. S. § 941, amended Act March 3, 1899, c. 441, 30 Stat. 1354, U. S. Comp. St. § 1567.)

6. STATUTES REGULATING EVIDENCE IN THE FEDERAL COURTS

Mode of proof in equity and admiralty causes—The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided. (R. S. § 862, U. S. Comp. St. § 1470.)

Competency of witnesses; civil cases—The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is

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held. (R. S. § 858, amended Act June 29, 1906, c. 3608, 34 Stat. 618, U. S. Comp. St. § 1464.)

Depositions de bene esse—The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the

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same manner as witnesses may be compelled to appear and testify in court. (R. S. § 863, U. S. Comp. St. § 1472.)

Mode of taking depositions de bene esse—Every person deposing as provided in the preceding section shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent. (R. S. § 864, amended Act May 23, 1900, c. 541, 31 Stat. 182, U. S. Comp. St. § 1473.)

Transmission to the court of depositions de bene esse—Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. (R. S. § 865, U. S. Comp. St. § 1474.)

Depositions under a dedimus potestatem and in perpetuam—In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that

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may be cognizable in any court of the United States. And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five, shall not apply to any deposition to be taken under the authority of this section. (R. S. § 866, U. S. Comp. St. § 1477.)

Depositions in perpetuam; admissible at discretion of court—Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in perpetuam rei memoriam, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof. (R. S. § 867, U. S. Comp. St. § 1478.)

Deposition under dedimus potestatem; how taken—When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpœna; and if any witness, after being duly served with such subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court. (R. S. § 868, U. S. Comp. St. § 1479.)

Subpœna duces tecum under a dedimus potestatem—When either party in such suit applies to any judge of a United States court in such district or Territory for a subpœna commanding the witness, therein to be named, to

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appear and testify before said commissioner, at the time and place to be stated in the subpœna, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpœna, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with such subpœna, fails to produce to the commissioner, at the time and place stated in the subpœna, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties. (R. S. § 869, U. S. Comp. St. § 1480.)

Witness under a dedimus potestatem, when required to attend—No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going

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to, returning from, and one day's attendance at, the place of examination, are paid or tendered to him at the time of the service of the subpœna. (R. S. § 870, U. S. Comp. St. § 1481.)

Letters rogatory from United States courts—When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the Government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts. (R. S. § 875, amended Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 241, U. S. Comp. St. § 1486.)

Witnesses; subpœnas; may run into another district—Subpœnas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: Provided, That in civil causes the witnesses living out of the district in which the court is held do not

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live at a greater distance than one hundred miles from the place of holding the same. (R. S. § 876, U. S. Comp. St. § 1487.)

Witnesses; subpœna; form; attendance under—Witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney. (R. S. § 877, U. S. Comp. St. § 1488.)

ACT MARCH 9, 1892 (27 Stat. 7 [U. S. Comp. St. § 1476]).
An act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States.

Depositions; mode of taking—In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held. (Act March 9, 1892, c. 14, 27 Stat. 7, U. S. Comp. St. § 1476.)

7. THE HANDWRITING ACT

ACT FEB. 26, 1913 (37 Stat. 683 [U. S. Comp. St. § 1471]).
An Act relating to proof of signatures and handwriting.

Comparison of handwriting—In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness. (Feb. 26, 1913, c. 79, 37 Stat. 683, U. S. Comp. St. § 1471.)

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8. SUITS IN FORMA PAUPERIS (27 Stat. 252, amended 36 Stat. 866 [U. S. Comp. St. § 1626])

An Act to amend section one, chapter two hundred and nine of the United States Statutes at Large, volume twenty-seven, entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," and to provide for the prosecution of writs of error and appeals in forma pauperis, and for other purposes.

Suits by poor persons; prepayment of or security for fees or costs; affidavit of poverty—Any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal. (Act July 20, 1892, c. 209, § 1, 27 Stat. 252, amended Act June 25, 1910, c. 435, 36 Stat. 866, U. S. Comp. St. § 1626.)

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9. CERTAIN ADMIRALTY SUITS AGAINST THE UNITED STATES

[Public—No. 156—66th Congress.]

[S. 3076.]

An Act Authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this Act shall not apply to the Panama Railroad Company.

Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a

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copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Sec. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void

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and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

Sec. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

Sec. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

Sec. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

Sec. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage,

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or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: Provided, however, That nothing in this section shall be held to prejudice or preclude a claim of the im-

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munity of such vessel or cargo from foreign jurisdiction in a proper case.

Sec. 8. That any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of section 9 of this Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

Sec. 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 2, 4, 7, and 10 of this Act.

Sec. 10. That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel.

Sec. 11. That all moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States

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Treasury to the credit of the Department of the Government of the United States, or of the United States Shipping Board, or of such aforesaid corporation, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

Sec. 12. That the Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the United States and such aforesaid corporation, and the Secretary of any department of the Government of the United States, and the United States Shipping Board, and the board of trustees of any such aforesaid corporation, shall likewise report the arbitration awards or settlements of claims which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived.

Sec. 13. That the provisions of all other Acts inconsistent herewith are hereby repealed.

Approved, March 9, 1920.

10. THE ADMIRALTY RULES OF PRACTICE
(29 Sup. Ct. xxxix)

(The Captions are Added for Convenience of Reference.)

Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction, on the Instance Side of the Court, in Pursuance of the Act of the 23d of August, 1842, chapter 188.

1. **[Process on filing libel.]** No mesne process shall issue from the District Courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by

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some discreet and disinterested person appointed by the court.

2. **[Process in suits in personam.]** In suits in personam, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

3. **[Bail in suits in personam.]** In all suits in personam, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

4. **[Bond in attachment suits in personam.]** In all suits in personam, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon

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such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

5. **[Bonds—Before whom given.]** Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

6. **[Reduction of bail—New sureties.]** In all suits in personam, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.

7. **[When special order necessary for warrant of arrest.]** In suits in personam, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

8. **[Monition to third parties in suits in rem.]** In all suits in rem against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the cus-

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tody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

9. **[Process in suits in rem.]** In all cases of seizure, and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

10. **[Perishable goods—How disposed of.]** In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy in decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

11. **[Ship—How appraised or sold.]** In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court,

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upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.

12. **[Material-men—Remedies.]** In all suits by material-men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam.

13. **[Seamen's wages—Remedies.]** In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone in personam.

14. **[Pilotage—Remedies.]** In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone in personam.

15. **[Collision—Remedies.]** In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone in personam.

16. **[Assault or beating—Remedies.]** In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.

17. **[Maritime hypothecation—Remedies.]** In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of marine interest, the libellant may proceed either in rem or against the master or the owner alone in personam.

18. **[Bottomry bonds—Remedies.]** In all suits on bot-

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tomry bonds, properly so called, the suit shall be in rem only against the property hypothecated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be in personam against the wrong-doer.

19. [Salvage—Remedies.] In all suits for salvage, the suit may be in rem against the property saved, or the proceeds thereof, or in personam against the party at whose request and for whose benefit the salvage service has been performed.

20. [Petitory or possessory suits.] In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

21. [Execution on decrees.] In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

22. [Requisites of libel of information.] All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United

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States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

23. **[Requisites of libel in instance causes.]** All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, in rem or in personam (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

24. **[Amendments to libels.]** In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time,

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on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

25. **[Stipulation for costs by defendant.]** In all cases of libels in personam, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

26. **[Claim—How verified.]** In suits in rem, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner, and that no other person is the owner thereof. And, where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

27. **[Answer—Requisites of.]** In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer

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shall be full and explicit, and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.

28. **[Answer—Exceptions to.]** The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

29. **[Default on failure to answer.]** If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

30. **[Effect of failure to answer fully.]** In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken pro confesso against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

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31. [What defendant may object to answering.] The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense.

32. [Interrogatories in answer.] The defendant shall have a right to require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libellant to such interrogatories the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory pro confesso in favor of the defendant, as the court in its discretion, shall deem most fit to promote public justice.

33. [How verification of answer to interrogatory obviated.] Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

34. [How third party may intervene.] If any third person shall intervene in any cause of admiralty and maritime jurisdiction in rem for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the

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court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

35. **[How stipulation given by intervenor.]** The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

36. **[Exceptions to libel.]** Exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.

37. **[Procedure against garnishee.]** In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

38. **[Bringing funds into court.]** In cases of mariners' wages, or bottomry, or salvage, or other proceeding in rem, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession

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of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

39. **[Dismissal for failure to prosecute.]** If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

40. **[Reopening default decrees.]** The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy, and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

41. **[Sales in admiralty.]** All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

42. **[Funds in court registry.]** All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name

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of the court, and shall not be drawn out, except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

43. **[Claims against proceeds in registry.]** Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene pro interesse suo for delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

44. **[Reference to commissioners.]** In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

45. **[Appeals.]** All appeals from the district to the Circuit Court must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specially made in the particular suit; or in case no such rule or order be made, then within thirty days from the rendering of the decree.

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46. **[Right of trial courts to make rules of practice.]** In all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

47. **[Bail—Imprisonment for debt.]** In all suits in personam, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analogous process issuing from the state court.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been, or shall be hereafter abolished, upon similar or analogous process issuing from a state court.

48. **[Answer in small claims.]** The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

49. **[Further proof on appeal.]** Further proof, taken in a Circuit Court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a Circuit Court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such

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deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel: Provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

50. **[Evidence on appeal.]** When oral evidence shall be taken down by the clerk of the District Court, pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

51. **[Issue on new facts in answer.]** When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be filed, unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

52. **[Record on appeal.]** The clerks of the District Courts shall make up the records to be transmitted to the Circuit Courts on appeals, so that the same shall contain the following:

1. The style of the court.

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2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.

4. The libel, with exhibits annexed thereto.

5. The pleadings of the defendant, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal, and the action of the district court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:

1. The continuances.

2. All motions, rules, and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogato-

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ries and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

2. The clerk of the District Court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

3. Hereafter, in making up the record to be transmitted to the circuit clerk on appeal, the clerk of the District Court shall omit therefrom any of the pleading, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

53. **[Security on cross-libel.]** Whenever a cross-libel is filed upon any counter-claim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

54. **[Limitation of liability—How claimed.]** When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of

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limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An act to limit the liability of shipowners and for other purposes," now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post-office, or otherwise, as the court, in its discretion may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

55. **[Proof of claims in limited liability procedure.]** Proof of all claims which shall be presented in pursuance

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of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and upon the completion of said proofs, the commissioners shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense), shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

56. **[Defense to claims in limited liability procedure.]** In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

57. **[Courts having cognizance of limited liability procedure.]** The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf. When the said ship or

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vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.

58. **[Appeals in.]** All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of the United States where such cases are or shall be pending in said courts upon appeal from the District Courts.

59. **[Right to bring in party jointly liable in collision case.]** In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against in personam, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation,

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with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

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